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RECORD EXTRACT OF APPELLANT

IN THE
APPELLATE COURT
OF MARYLAND

September Term 2023, 61
No. 61

JUSTIN HOLDER

Appellant

V.

BENJAMIN ESTES

Appellee

Appeal from the Circuit Court of Washington County
The Honorable Andrew F. Wilkinson

RECORD EXTRACT

Volume 1

JUSTIN HOLDER
APPELLANT

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

BENJAMIN ESTES *

Plaintiff *

v. * **CASE NO. C-21-CV-20-430**

JUSTIN HOLDER, et al. *

Defendants *

TRANSCRIPT OF PROCEEDINGS

(PRELIMINARY INJUCTION HEARING)

(VOLUME 1 – DAY 1)

Circuit Court

Hagerstown, MD

December 15, 2022 at 10:02 a.m.

Before:

The Honorable Andrew F. Wilkinson

Appearances:

Alyse Prawde, Esquire, attorney for Plaintiff, Benjamin Estes; and

Justin Holder, Defendant, pro se; and

Brandy Peeples, Esquire, attorney for Defendant, Deena Holder.

Transcribed from electronic recording by:

Linde M. Cessna, Court Reporter
Circuit Court for Washington County, Maryland
The Court House
Hagerstown, Maryland 21740
240-313-2564

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P R O C E E D I N G S

THE COURT: Folks, I need to get myself organized. Give me a second, okay? Okay, we're on the record for C-21-CV-20-430. This is the matter of Estes v. Holder. Defendant is Justin Holder, Deena Holder, Uncle Eddie's Broke Down Palace, LLC. I apologize for starting late today. The Court, we got an email early this morning saying that court did not start until 10:00. I don't know how that makes its way out to the public knowledge. I know you were here early Mr. Holder. Sorry. And also, let me apologize to all of you. We were supposed to do this hearing trial I think a month ago at least, right? I woke up that morning I felt bad. And I said, you know what? I've never had COVID I don't know what it's supposed to feel like. So, I took a test and bang, so that morning, so I apologize. I really felt bad that I had to cancel. So, but we are here now. Counsel, if you could identify yourselves and the parties and then Mr. Holder.

MS. PRAWDE: Good morning, Your Honor, Alyse Prawde, on behalf of the Plaintiff, Benjamin Estes, who is seated to my left.

THE COURT: Hi, Ms. Prawde.

MS. PEEPLES: Good morning, Your Honor, Brandy Peeples, on behalf of Deena Holder who is not here today.

And I'm really only here in an abundance of caution because I'm not sure the issues pertain to her as far as this portion of the proceeding.

THE COURT: I don't know. Well, we'll discuss what the issues are today and you can decide what you want to do. Okay.

MS. PEEPLES: And for the record, I had a COVID test last week and had to do the same thing you did so I'm negative now but.

THE COURT: Okay.

MS. PEEPLES: Thank Your Honor.

THE COURT: And, sir?

MR. HOLDER: Your Honor, Justin Holder in proper person, sir.

THE COURT: Very well. Thank you. Okay. I note that Mr. Kline is not here on behalf of Uncle Eddie's Broke Down Palace, LLC. Is it the understanding that he was not going to be here today?

MS. PEEPLES: That's correct, Your Honor.

THE COURT: Okay. Let's talk about where we are.

MS. PRAWDE: And, Your Honor, I have not had communications with Mr. Kline so I was not aware he was not going to be here. Plaintiff has no objection to Uncle Eddie's not participating in these limited issues, however.

THE COURT: Okay. Let's talk about where we are. Well speaking of Mr. Kline did he file any sort of consent to whatever judgment the Court enters today? We'll take a look. I'm not sure he did.

MS. PRAWDE: Not that I'm aware of, Your Honor.

THE COURT: You're not aware of anything. Okay. Alright. We are here today to discuss two issues. One, the first issue, which will then drive a little bit of the second issue, is what is the Water Law of the State of Maryland regarding the water that is in this area of the Antietam Creek. My guess is that that's probably more of a legal argument than it is a factual argument but there might be a need for facts if any of the parties decide that.

The second issue today is whether an injunction should be issued or ordered and that would, I would expect need some sort of testimony. And so, here's the order that we will go in today. First, we will begin, I think it's important with any preliminary motions I think we should have a discussion whether there are any and we will hear them. Then, we will begin the trial in earnest opening statement. Because the Water Law issue is an important factor I think if it's okay with counsel I'll -- Ms. Prawde, I'll allow you to handle your case how you want to handle your case but I would suggest maybe it

makes sense for us to have the legal argument as to what the water law is of the State of Maryland and then if I need testimony on that then we can go into the testimony portion. Testimony portion would be if we need more information about Water Law or the facts on the ground here and then testimony concerning the four factors of injunction. And then we would get to closing argument. I will let everybody know that I have a hard stop at noon because I have something I need to take care of so we will be stopping at exactly noon irrespective of where we are, even if there's a witness on the stand. Unless that witness is going to be done in the next question. Okay.

Ms. Prawde, any concerns about that sort of procedure today?

MS. PRAWDE: No, Your Honor.

THE COURT: Ms. Peeples?

MS. PEEPLES: Uh, no, sir.

THE COURT: Okay, Mr. Holder?

MR. HOLDER: I don't have any concerns.

THE COURT: Okay. Let's then proceed then with a discussion of preliminary motions or preliminary matters. Ms. Prawde, do you have any preliminary motions or preliminary matters that we need to discuss?

MS. PRAWDE: Yes, Your Honor. Just very briefly.

THE COURT: Go ahead.

MS. PRAWDE: To the extent that we do get to witness testimony, um, we would ask that the Rule on Witnesses apply here and that they, any witnesses or not parties be outside of the courtroom. And, again, to the extent that we get to testimony today from any witnesses Mr. Holder has subpoenaed John Dowling who is Plaintiff's land surveyor expert as well as Mr. Estes' former attorney Aaron Neal. To the extent that Mr. Holder does intend to call them in the proceedings today I would like to be heard on that as to why their testimony should be excluded.

THE COURT: Okay. We will get to that in a moment.

MS. PRAWDE: And then the third piece, Your Honor, we had submitted yesterday afternoon a Bench Memorandum, which lays out the law or argument as to the law related to this matter.

THE COURT: Yesterday you did that? Yesterday?

MS. PRAWDE: I'm sorry?

THE COURT: Yesterday you did that?

CLERK: I sent it to you this morning.

MS. PRAWDE: I do have a hard copy if you'd like me to pass up to you.

THE COURT: I'll need it. How is it different than the one that you had filed previously that Mr. Holder had objected to? Is it a new one?

MS. PRAWDE: It is, uh, a lot of the case law is very similar. We have just added some additional case law that deals more exclusively or specifically with the land underneath the water.

THE COURT: So, it will be part of your legal argument?

MS. PRAWDE: Correct.

THE COURT: We'll do it when we get to the legal argument.

MS. PRAWDE: Okay. Okay.

THE COURT: Okay.

MS. PRAWDE: Nothing further.

THE COURT: Okay, so the two witnesses that you were concerned about were Dowling and who?

MS. PRAWDE: John Dowling and Aaron Neal who were both subpoenaed.

THE COURT: Okay.

MS. PRAWDE: Again, I don't know if the intent is still to call them.

THE COURT: I don't know.

MS. PRAWDE: Request argument if so.

THE COURT: Any objection to the Rule on Witnesses?

MS. PEEPLES: No, Your Honor.

THE COURT: Okay. I will institute the Rule on Witnesses. What the Rule on Witnesses means is that

anybody that you expect to testify in this matter other than the parties will need to sit outside. Is there anybody in the courtroom now that looks like that?

MS. PRAWDE: Um, Mr. Estes' wife, Lisa Estes, who we possibly intend to call.

THE COURT: Alright, Ms. Estes, I need you to step outside, sort of stay close. Okay. But it's going to be awhile so if you want to get on and do some emails or something now is a good time. Okay. We will deal with the testimony of Dowling and Aaron Neal as we have this further discussion. Ms. Peeples, are there any preliminary matters we need to deal with?

MS. PEEPLES: I do, and one preliminary matter is based upon the Bench Memorandum that was received late yesterday. But before we even get to that I would like to orally make a motion that I know there were late affidavits and other discovery produced in this case that were available before the close of discovery. So, I would move this Court not to admit them into evidence simply because there's been plenty of time to produce it and producing affidavits and other discovery at the 11th hour prejudices the Defendants in connection with the defense of their case.

THE COURT: Okay.

MS. PEEPLES: And, so, I can provide Your Honor with

a litany. Again, I'm playing catch-up from COVID myself, so I apologize for that. Secondly, and the way I read the Bench Memorandum by the Plaintiffs and the way I read your Order of yesterday, I wanted to cite the case of *Havre De Grace versus Harlow*, 129 Md. App. 265, in that navigability of riverways is a question of fact. And I believe that number one, evidentiary testimony needs to be submitted to determine whether or not - - And before we can even get to the water rights in this case, there needs to be a legal and evidentiary conclusion that the waterway at issue the Little Antietam Creek is navigable. And searching - - And I can provide, Your Honor, with a Bench Memorandum as well as I started one late last night after Ms. Prawde's memorandum. I believe the issue of navigability really hinges on expert testimony to make an opinion. It's not just the fact witness going out into the creek and talking about, oh, it's this deep. You have to look at a multitude of factors including whether or not commerce could be sent down a stream and commerce could even mean just floating logs down the stream. I mean there are certain creeks and streams that have been determined to be navagatable even though they are not ships going down those waterways. And I think when you look at most cases involving the question of navigability it requires an expert to make the determination as to

what these creeks are. Absence of judicial notice of a governmental finding that a waterway is in fact navigable. And for that reason, if you look at the Plaintiff's expert witnesses named in this case there is not an expert on whether or not the Little Antietam Creek or the Antietam Creek are navigable waterways. And I think that they need to meet that threshold for this Court to understand what exactly constitutes navigability before we can get to whether the public has a right in the stream. Thank you.

THE COURT: Thank you. Well, with regard to late affidavits, late discovery, I think that will be an issue that we'll deal with as the trial progresses because I don't know what's late. I don't know that they're even bringing it in. I don't know. With respect to the Bench Memorandum, I'll take a look at theirs when they're ready. If you have one, I'll take a look at yours as well.

MS. PEEPLES: Okay.

THE COURT: And then with respect to the issue of navigability requiring facts and maybe requiring expert witnesses, I don't know what the Plaintiff is about to show me. So, we will hear about it.

MS. PEEPLES: Okay.

THE COURT: I'd like to have my point about splitting

up the water and the facts is more, I just want to be sure that if you want to argue water law, what the law says, let's have that discussion before we get into the facts so that I can understand what your point of view is, what Mr. Holder's point of view, what Ms. Prawde's point of view is. So that when I'm receiving facts I'm thinking what your positions are with regard to the law rather than tell me the law at the end. Okay, that was my point.

MS. PEEPLES: I appreciate that, Your Honor.

THE COURT: Okay.

MS. PEEPLES: I just wanted to make it clear that there are issues here that, that, that are germane to the discussions that Your Honor set.

THE COURT: Understood. Okay, Mr. Holder, any preliminary matters or preliminary motions?

MR. HOLDER: Uh, yes, Your Honor.

THE COURT: Go ahead. How many?

MR. HOLDER: Probably just one.

THE COURT: Okay.

MR. HOLDER: Generally. I was very concerned with this hearing because I didn't really, I didn't really understand what we were doing and what was being heard. There was a jury demands made in other cases that other parties have stayed saying they're - - specifically 116

case is stayed waiting on other decisions in other trials and I think it's been pretty obvious that I've been trying to join the matters so that I can fully litigate what I believe is my flip side of that coin. And the courts have found facts that are adverse, you know, to me in other proceedings which the other parties now are arguing collateral estoppel. You know, I don't feel that I was fully able to litigate those issues and I think the Court, even yourself, was very clear in a lot of the cases. Hey, I don't think that's relevant to this case, you know, and we're not going to litigate that hearing. I appreciate that. But there's also another principle of collaterally attaching a judgment. And once a judgment is made it's a little bit harder to back out of that to show that that judgment because they're sound public policy once you make your decision like you said with the Motion for Summary Judgment, we're not relitigating the boundary. We don't want to keep going back in and opening these things back up.

So, that being said, I'm very concerned that this Court may determine facts in this Court under equity that I'm really asking a jury to determine in the 116 or the other four counts.

THE COURT: What's the 116 case?

MR. HOLDER: The 116 is the sort of hey, you guys

came after me with criminal charges and - -

THE COURT: But, you, you sued who?

MR. HOLDER: I sued Christine Morral, Scott Morral, Benjamin Estes, Town of Keedysville, um - -

THE COURT: Okay, is that the one that Mr. Greivell represents you on?

MR. HOLDER: Mr. Greivell is - - Yes, he representing that one. That one is on stay until we get some decision from Court of Appeals per the Defendant's request.

THE COURT: Okay.

MR. HOLDER: And once - -

THE COURT: And, so - -

MR. HOLDER: Oh, I'm sorry.

THE COURT: Just so that I understand. In the 116 that's down at the Court of Appeals, Court of Special Appeals?

MR. HOLDER: 116 is on stay.

THE COURT: Okay.

MR. HOLDER: The *Young* and then the other *Holder vs. Morral*, I'll call them the real property claims - -

THE COURT: Okay.

MR. HOLDER: Up in Stonecrest, you know –

THE COURT: Yes.

MR. HOLDER: - - that's in Court of Special Appeals. Jeffrey Young has agreed to consolidation at least a

portion of it.

THE COURT: So, the *Young* case and the 420 case are at the Court of Special Appeals?

MR. HOLDER: And another appeal that Bob, I'm sorry, Uncle Eddie's filed. I guess there was subdivision. I'm assuming he didn't, um.

THE COURT: Okay.

MR. HOLDER: So, there's, there's discussions of how they should be joined going on between me and - -

THE COURT: So, your concerned, if I'm understanding, is that decision here in the 430 case could adversely affect your rights in the 116 case, the 420 case and the *Young* case, which I recall might be the 370, does the 370 sound right?

MR. HOLDER: 371.

THE COURT: 371 okay.

MR. HOLDER: Yeah, I would just –

THE COURT: Okay, so what's your point?

MR. HOLDER: Well, my point is I know, I know it seems, and I've heard through the grapevine that the rumor around the court is I subpoenaed everybody but Jesus Christ to the case and I, I know that I subpoenaed a lot of people.

THE COURT: I don't know, it was like 12.

MR. HOLDER: It was but - -

THE COURT: Okay.

MR. HOLDER: - - a lot of them were just here to keep the Plaintiff honest. Just so, so he wouldn't in the minute, the minute DNR goes out he comes in and he files a Bench Trial Memorandum. At the bottom it says, "DNR makes clear" - - But the Mary Carter agreement testimony I have, and I filed an objection to their bench trial and I put the affidavit of irony on there. And Aaron Neal says, hey, I don't know what good this stipulation is even going to do us because this property is titled to the State of Maryland and DNR says we don't have the authority to act for the State of Maryland. But without having that witness there to keep Plaintiff honest his bad faith just oozes out in front of this Court. And I know you've already decided he doesn't have bad faith but this is bad faith. He knows that the State, that the DNR cannot make this stipulation for the State and now he's going to put it in front of this Court as if the DNR has made clear they have no interest.

THE COURT: Do you mean the DNR statement that the stipulation that was made in this case between Mr. Estes as Plaintiff and the State of Maryland DNR as a Defendant for them to be dismissed from the case? That's what you're talking about?

MR. HOLDER: Yes.

THE COURT: Okay.

MR. HOLDER: The negotiations between Aaron Neal and the DNR the emails I have.

THE COURT: What do I care about what they negotiate? Don't I only care about what is in writing in the stipulation?

MR. HOLDER: Well, that's the problem with the Mary Carter Agreement and that's why I just referred to the -- I had Mr. Remus file for me into this case with the Tally Kovacs subpoena because a lot of states say they're just not ethical to even have Mary Carter agreements.

THE COURT: Okay. So, as a preliminary matter before we start the opening statements, what are you asking me right now?

MR. HOLDER: I'm moving this Court to consolidate this trial with the 116 trial.

THE COURT: Overruled. Denied.

MR. HOLDER: Okay. Thank you.

THE COURT: Okay, stand up.

MR. HOLDER: Oh, I'm sorry.

THE COURT: Anything else?

MR. HOLDER: Your Honor, I'm also concerned with the -- -

THE COURT: You have a lot of I'm concerned that you're forgetting some motions that you've asked to file.

MR. HOLDER: Yea, I know. I do.

THE COURT: Okay.

MR. HOLDER: I do have - - I do have a motion I would ask that, and I know you're well aware and I know that you know all the evidentiary rulings in the 371 case. I felt that, in that case I was prejudiced from entering in evidence. I felt that in this case I've been prejudiced from entering in evidence and I feel like that when you - - And I don't know that you did this but Clerk Tucker told me that you discussed projecting filings off the docket and it concerns me that maybe for whatever reasons you've as your previous experience as County Attorney and knowing Kirk Downey and my litigation with the County you know those guys. You've been around Judge Michael, Mr. Estes' attorney. You've dealt with these people. And it's just I think there's been a lot of defamation and it's caused people in high positions to treat me differently.

THE COURT: Okay.

MR. HOLDER: And potentially that you made, unconsciously, not, not consciously, have some bias.

THE COURT: So, you're asking me to recuse?

MR. HOLDER: I am. I would like to ask you to recuse yourself please.

THE COURT: Okay. Ms. Prawde, do you wish to be

heard?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Go ahead. Mr. Holder, you can sit down.

MR. HOLDER: Thank you, Your Honor.

MS. PRAWDE: Your Honor, I will just keep this very brief. We object to the Defendant's Motion to Recuse Your Honor from this matter. Um, in terms of any other rulings related to any other cases I don't think that is pertinent. Maryland has been extremely clear that a judge is only required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judges impartiality. The Court of Appeals has made clear that it is an extremely high standard for a judge to be required to recuse themselves. We don't believe that the Defendant has met that standard in this case. Thank you.

THE COURT: Ms. Peeples, do you wish to be heard?

MS. PEEPLES: Your Honor, I'm taking no position on this motion.

THE COURT: No position. Mr. Holder, do you wish to be heard anymore?

MR. HOLDER: I believe Ms. Prawde recited the correct Maryland law that it's a reasonable person standard and I do believe a reasonable person would find that the

rulings have been unfairly biased and prejudicial over the entirety of the litigation and allowing me to enter evidence into the Court. It's my record on appeal.

THE COURT: They've been biased because you've lost?

MR. HOLDER: No, they've been biased because I asked to be heard on public roads and you told me I could enter evidence for public roads.

THE COURT: I made a determination that public roads in that 371 case was not relevant at all because you were making a claim that roads existed that obviously do not exist.

MR. HOLDER: Well, Your Honor, I've asked - -

THE COURT: I know you and I disagree on that point. I made that decision. (Cellphone ringing) Did you turn your ringer off?

MR. HOLDER: I'm trying to.

THE COURT: Go ahead, make sure you got it off. I'm making sure mine is off too. I don't want you to feel nervous that it's ringing. Is it okay?

MR. HOLDER: There was actually someone there talking. And I'm sorry. And I mean this with all due respect.

THE COURT: No, no it's - -

MR. HOLDER: But, I, my record. Mr. Michael I went to Tony's Pizza this summer.

THE COURT: I'm not interested in something that happened at Tony's Pizza and Joe Michael.

MR. HOLDER: Okay. It's something that he said about the Court, about his duty to the Court to make sure the record is right for appeal.

THE COURT: That's right.

MR. HOLDER: And I'm in the middle of these appeals and I'm realizing the stuff that I thought was important to be in the record I don't, I don't even have an opportunity to have had that evidence in the record and it's really - -

THE COURT: Because the Court made a determination - - Let's assume that evidence you tried to get in did not get in. It is because the Court at that moment made a decision that that evidence was not relevant. Now, on appeal the Court down in Annapolis could say, wow, that trial judge really messed up. That trial judge should have had this particular evidence in the record. And I'm sure that's something you're arguing to them. And that's what their job is to determine whether I did my job correctly.

But I think you've got to admit, Mr. Holder, that in 371 case that if I wasn't there to help you get stuff into evidence you might not have gotten anything in. I guided you and I probably went further than most judges

would with a *pro se* party. I told you exactly how to get stuff in, when you couldn't I jumped in and I actually helped you get stuff in. So, I understand what you're saying. I hear you. But just because you disagree with my decisions does not lead to the conclusion that I have shown bias against Justin Holder. I believe the opposite. I believe that as a judge I have shown you incredible patience, I have helped you probably more than I'm supposed to. And at every chance I have told you, Mr. Holder, I can't believe you're not an attorney because you do a really good job.

MR. HOLDER: I appreciate that.

THE COURT: You want me to recuse because you believe that I am biased and that a reasonable person would believe that I have shown bias towards you.

MR. HOLDER: It was the rejected filings discussion with Clerk Tucker that it's not being able to have my papers on the record. You don't understand how frustrating that is as a *pro se* litigant to not even be able to get on the docket. And, I'm not gonna - - Listen you're a very nice man.

THE COURT: I'm not really familiar - - I'm not really familiar with what you're talking about.

MR. HOLDER: Okay.

THE COURT: My recollection is it had to be a case

that had a Case Management Order in it and I think two of the cases do or did. And there was concern, and I'm not, I'm not even sure if it was you. There was concern in the Clerk's Office that because I put a Case Management Order in and something came in that they thought violated that Order should they put it in or should they not. Should they be the ones to decide that it violates the Order. And my recollection is that I said no, you clerks are not to be in the position of feeling the responsibility of what gets in and what doesn't, what violates my Order and what doesn't. I decide that.

MR. HOLDER: Okay.

THE COURT: And, so, the directive was given and I recall those Case Management Orders that basically said if anybody wanted to file a motion file a letter first, right? Okay. I'd read the letter. If I thought a motion would be okay I would authorize a motion. If I thought not I said no. But if something came in that was more in the nature of a motion than just the request letter I didn't want the clerks having to be the ones to feel the weight of responsibility to decide whether something violated my order. I think only I should decide what violates my order. So, the directive was given, if you feel concerned that something that Justin files, Mr. Holder files or Mr. Estes files or Mr. Young

files, whatever case has a Case Management Order and you're afraid to put it in or not put it in, bring it to my office. I'll look at it and I'll you whether to put it in or not. And if it doesn't go in I'll explain why it shouldn't go it.

MR. HOLDER: And there be something on the record then?

THE COURT: I don't know.

MR. HOLDER: Yea.

THE COURT: But I think your - - Because decisions have not gone your way you think that there was some nefarious action by the Clerk's Office to strike something that you had filed and I just don't think that's true. Okay.

MR. HOLDER: Understand. I didn't mean any disrespect to the Court.

THE COURT: It's okay.

MR. HOLDER: I think, you know, and I appreciate the relationship we have. We've always been very cordial and very polite and I hope that you feel the same way about me. I do respect this Court. I have faith in this Court.

THE COURT: But you want me to recuse because you think I'm biased? Let's be fair. That's what you're asking.

MR. HOLDER: I am asking that. And I'll let you make a determination on that.

THE COURT: Okay.

MR. HOLDER: I think a reasonable person would find it.

THE COURT: I want to ask you a few questions.

MR. HOLDER: Okay.

THE COURT: Madam Clerk, will you swear Mr. Holder? Raise your right hand. Stay right there.

MR. HOLDER: Okay. (Clerk swears Mr. Holder at trial table seat.)

THE COURT: Stay right there. The reason I swore you is if an attorney was going to tell me something about something they filed they're obligated to tell me the truth. Okay.

MR. HOLDER: I understand.

THE COURT: As a *pro se* party you're treated a little different. Okay. In your, uh, you wrote a letter to the Court, October 3rd about me recusing, right?

MR. HOLDER: Yes.

THE COURT: According to the Order like we just talked about.

MR. HOLDER: Yes.

THE COURT: You also filed an objection yesterday.

MR. HOLDER: Uh, the 14th, the December 14 orders?

THE COURT: Yes.

MR. HOLDER: That's correct.

THE COURT: Okay. There were some things that you said in there that I want to understand - -

MR. HOLDER: Okay.

THE COURT: - - what your point is before I decide on recusal.

MR. HOLDER: Okay.

THE COURT: In your October 3rd letter, page 2 Section E, you wrote as one of the reasons I should recuse.

MR. HOLDER: Okay.

THE COURT: "On September 7th, 2022, Andrew Wilkinson issued an Order voiding litigant Holder's deeds."

MR. HOLDER: Yes.

THE COURT: "Particularly the third deed to the railroad property."

MR. HOLDER: Yes.

THE COURT: That's in the *Young* case, right?

MR. HOLDER: In the *Young* case. Sort of the 420 case too because you - -

THE COURT: Either way.

MR. HOLDER: Correct.

THE COURT: Definitely in the Young case.

MR. HOLDER: It is.

THE COURT: My Order was to void those deeds.

MR. HOLDER: And actually, it was in this case too because I relied in my amended answer - -

THE COURT: The Order was in the 370 case, 371 case. Okay.

MR. HOLDER: Okay.

THE COURT: I'm just asking you what you wrote. You wrote, "On September 7, 2022, Andrew F. Wilkinson issued an order voiding litigant Holder's deeds, particularly the third deed to the railroad property upon information and belief at the request of the State of Maryland."

MR. HOLDER: Yes.

THE COURT: "Upon information and belief at the request of the State of Maryland." What do you mean by that?

MR. HOLDER: I mean, I think the State of Maryland contacted you and asked you to get rid of the railroad deeds because they wanted them killed because they're in this case, they're in my pleadings.

THE COURT: Okay. I get it. You wrote upon information and belief. You believe the State of Maryland called me? What information do you have that the State of Maryland called me and directed me to void a deed and I followed their instruction?

MR. HOLDER: I have - -

THE COURT: What information do you have?

MR. HOLDER: An email from Talley Kovacs that refuses to deny the existence of this Mary Carter Agreement. I have - -

THE COURT: No. What information do you have that the State of Maryland called me and said Andrew, you need to issue a deed, you need to issue an Order that voids Justin's deed. What information do you have that the State of Maryland called me, directed me to do something and I followed it? The answer is none. Okay. I'm not going to sit here and beat around the bush. The answer is none. So, why are you putting in a pleading to this Court that you have information that I was engaged in misconduct with the State of Maryland?

MR. HOLDER: Because I believe I could discover that information if I was allowed to interview people.

THE COURT: No, that's not what that says. It says upon information that you have information that I was engaged in misconduct, what information do you have right now?

MR. HOLDER: That you had a discussion with Kevin Tucker about rejecting a filing from the docket against my constitutional rights. I have that information.

THE COURT: Incorrect. You indicated it was at the request of the State of Maryland that I void one of your

deeds. What information do you have that the State of Maryland directed me to void a deed? Again, I'm not going to beat around the bush. Here's the answer. You don't have an answer. I can tell, it's because you don't have any information. The State of Maryland did not contact me and direct that I avoid one of your deeds. I did that in the independent judgment of my office as a judge and I do not appreciate you putting in a pleading of this Court that you have information that I was engaged in misconduct. Do you understand? I'm going to ask that you not do that again.

Second, on page one of your October 3rd letter you talk about how attorney Ed Kuczynski was in the courtroom on the last day of trial in the *Young v. Holder* case, that's 371. And that the Court *sua sponte* introduced evidence of the town's subdivision ordinance after the close of evidence. You then in your objection on page 2 of 4 that's the objection that was filed on December 14 in paragraph 5 you write in the *Young* case, "The Court allegedly *sua sponte* applied the subdivision ordinance." What do you mean by that?

MR. HOLDER: Because Ed Kuczynski came and gave you the subdivision ordinance.

THE COURT: Incorrect.

MR. HOLDER: Okay.

THE COURT: I got the subdivision ordinance off of the internet. I looked it up myself. I looked at the subdivision ordinance because having had experience in land use I knew that subdivision ordinances in towns and counties can bear some relevance in land matters.

MR. HOLDER: Okay.

THE COURT: Well, no, not okay. Why are you saying that I got it from - - Why are you saying that I got it from Ed Kuczynski? Why are you saying he delivered it to me?

MR. HOLDER: Well, I said allegedly because I didn't have personal knowledge of that and I just gave you the factual circumstantial - -

THE COURT: Well, what is the allegation based on?

MR. HOLDER: The circum - -

THE COURT: The allegation has to be based on fact Mr. Holder. What fact do you have that I got that subdivision ordinance from Mr. Kuczynski. Why did you write it?

MR. HOLDER: I supported it with fact in my letter.

THE COURT: What fact? You tell me.

MR. HOLDER: That Ed Kuczynski was present in the courtroom. He wasn't a party to that case. He left out you guys, well I don't know that you met with him.

THE COURT: I did not.

MR. HOLDER: Okay. But he was in the courtroom. I looked at him with a cheshire cat grin I sort of read people very well and I believe that Ed Kuczynski assisted the Court somehow in obtaining the subdivision ordinance that was not brought up by anybody else. I heard Victor - -

THE COURT: So, you just guessed.

MR. HOLDER: No.

THE COURT: Because Mr. Kuczynski came to a court proceeding that is in the town that he is the attorney for. You therefore jumped to the conclusion that he and I had some secret meeting at which he gave me the subdivision ordinance and I used it against you.

MR. HOLDER: I also - -

THE COURT: That's what you think.

MR. HOLDER: Well, I hadn't finished explaining to you. But I also was in the courtroom on March 11th when Victor Cretella represented for Jeffrey Young and Ed Kuczynski were discussing the subdivision ordinance and the comprehensive plan.

THE COURT: To me?

MR. HOLDER: Between themselves.

THE COURT: Okay.

MR. HOLDER: And I believe Ms. Cessna may have said, "hey calm down this is being recorded." We had gotten

into - -

THE COURT: What does that have to do with me? What does that have to do with your now allegation based on nothing that I engaged in misconduct by meeting with the town attorney in order to receive the subdivision ordinance? What fact do you have that I actually did that?

MR. HOLDER: I don't have any facts that you had actually did that.

THE COURT: Okay, thank you. Thank you.

MR. HOLDER: That's why I said allegations, sir.

THE COURT: Thank you. Yes, but allegations have to be based on fact.

MR. HOLDER: Mr. Estes' are based on circumstantial evidence.

THE COURT: I'm not worried about Mr. Estes. You're the one that wrote in now two separate pleadings to this Court a suggestion that I was engaged in misconduct with respect to the subdivision ordinance. And I want to know exactly what fact you have against me that says I was engaged in misconduct. And the answer is you have none.

MR. HOLDER: I've also been (unintelligible) discovery.

THE COURT: I'm going to ask you again. Please, stop alleging misconduct by me unless it is based on fact.

MR. HOLDER: I will get discovery, Your Honor.

THE COURT: Your Motion to Recuse is denied. I'm going to tell you why. Even though I believe you have made false allegations for me, against me, I am still willing to be open and to hear this case and to show you the patience and the understanding that I have throughout all the litigation that has been in front of me. I'm disappointed that you would think that I would engage in misconduct against you. But I'm not hurt by it. I have given you more time and more patience and more consideration than I think a lot of judges would. And none of the factors that you, and none of the suggestions that you brought up in your October 3rd letter bear relevance to the issues that are here nor do they require my recusal. The motion is denied.

MR. HOLDER: Thank you, Your Honor.

THE COURT: What else do you want to bring up as a preliminary matter?

MR. HOLDER: Am I still under oath?

THE COURT: Yes.

MR. HOLDER: Okay.

THE COURT: I mean I can't take away the oath.

MR. HOLDER: Okay. So, I'm going to be arguing under oath the entire time?

THE COURT: Until I decide - - I mean, look, are you

planning on telling me the truth today?

MR. HOLDER: I am planning on telling you the truth today.

THE COURT: Then you should have no problem being under oath. What's your next preliminary matter?

MR. HOLDER: I just - - I feel like that's a disadvantage to argue a complete injunction hearing under oath. Certainly, Mr. Estes doesn't have that same disadvantage. This is what I'm talking about.

THE COURT: But I don't understand what you're saying. Are you planning on telling me the truth?

MR. HOLDER: I am planning to tell - -

THE COURT: Then who cares whether you are under oath.

MR. HOLDER: I always tell you the truth. I tell you exactly what I believe.

THE COURT: Did you tell me the truth when you alleged that I was engaged in misconduct?

MR. HOLDER: Yes.

THE COURT: Really? Based on no fact whatsoever.

MR. HOLDER: Your Honor, I'm just - -

THE COURT: You alleged that I was engaged in misconduct and that's telling me the truth?

MR. HOLDER: I have so much faith in this Court and it was so upsetting for me to even have to write that. I

don't ever want to write something like that.

THE COURT: Then don't write things that you don't know to be true. That's the point of being - -

MR. HOLDER: I intended on discovery - -

THE COURT: No, no, Mr. Holder. That's the point of being an attorney. And I know you're not an attorney but you have decided to engage in these multiple cases of litigation on your own behalf and that's wonderful. You've very good at it. Okay.

MR. HOLDER: Thank you.

THE COURT: But the day you leave law school and you receive that diploma is the day that you burn into your brain lesson number one. And lesson number one is you better not say it in a courtroom and you better not write it in a piece of paper unless you know it's true. And if your clients lie to you, you better not go along with a client that is lying to you. Stop looking at Mr. Estes. Stop looking at Ms. Prawde. You look at me.

MR. HOLDER: Okay.

THE COURT: Okay.

MR. HOLDER: Yes, Your Honor.

THE COURT: That's rule number one. And you wrote several times allegations but the allegation has no factual basis and so it is a false allegation. So, do you have a concern about telling me the truth today?

MR. HOLDER: No, I'm just going to put an objection on the record that I'm being disadvantaged but that's fine, we'll stay under oath the whole time.

THE COURT: What - - Just tell me what your next preliminary matter is.

MR. HOLDER: Well, I'd just ask for the Motion to Consolidate.

THE COURT: I've already denied that I think.

MR. HOLDER: You did?

THE COURT: To consolidate case 430 and 116 - -

MR. HOLDER: Okay.

THE COURT: - - to me those are separate cases involving different parties, different facts. It would lead to multi farious litigation meaning too many people involved in issues that don't necessarily involve them. They would be defending things that don't involve them. And that's why it would be denied.

MR. HOLDER: Okay. Alright. Then I think just the other preliminary matter you said you would hear at trial is there is a paper that I filed on basically a collateral estoppel to the point that he's, I think it's the two dismissal rule.

THE COURT: Okay.

MR. HOLDER: It's going to be 25060. Basically, he acquiesced (unintelligible) on a criminal charges he

filed *pro se* and then the stipulations. At least to the waters. I'm not saying the land underneath. But to all the waters on the Estes' property he's already agreed that we can be in the water. That he can't enjoin me from the water.

THE COURT: Okay, stop. Because I think you're telling me two different things.

MR. HOLDER: Okay.

THE COURT: Okay. The first is sort of the double dismissal rule.

MR. HOLDER: Yeah, the 25060 and if you don't mind I can look on my computer.

THE COURT: Oh, it's okay. You don't have to bring it up. I just want to understand what you're saying. You're saying that the dismissal of the, the nolle prosse of the criminal charge?

MR. HOLDER: Yes.

THE COURT: Okay. So, the nolle prosse - -

MR. HOLDER: That's the first - -

THE COURT: - - of the criminal charge is number one.

MR. HOLDER: Very first, voluntary dismissals.

THE COURT: Okay.

MR. HOLDER: There's a second voluntary dismissal on April 11th of 2021 of a second criminal trespassing charge.

THE COURT: Okay. Stop. You were charged in two separate cases of criminal trespass or were they one case?

MR. HOLDER: Two separate cases.

THE COURT: Okay. Okay.

MR. HOLDER: And then the stipulation between Mr. Estes and the DNR that I objected to, I'll be honest, I couldn't find any specific case law for that. The case law sort of says if it - - Well it does say for a fact if it's a second voluntary dismissal by the Plaintiff not stipulated not by the Court. The problem is I object to it, right. They stipulate without my permission. I object to it and then the Court orders the dismissal. So, I'm not sure how to treat that one. But I feel like that's a voluntary dismissal by the Plaintiff because it was bilateral.

THE COURT: Okay. Okay. What else then?

MR. HOLDER: Just that. I think that will take care of them all.

THE COURT: Okay. I will take that under consideration. I'm not going decide right now.

MR. HOLDER: Okay.

THE COURT: But certainly, as we go along you are permitted to bring up that stipulation if there's witness testimony or in any of your argument.

MR. HOLDER: Okay.

THE COURT: Okay.

MR. HOLDER: And then I just, I guess as a matter to help the Court decide the procedure I do have five certified records from the State of Maryland on legislation of just what is a public waterway and what you can do in there.

THE COURT: Okay.

MR. HOLDER: Sitting down here if we can, whenever you want to bring them in that's fine.

THE COURT: Well, it will be for you to bring in.

MR. HOLDER: Okay.

THE COURT: It's not my job to bring in. You tell me when you're ready to bring them in.

MR. HOLDER: Okay.

THE COURT: It will be when we get to your argument probably.

MR. HOLDER: Of law.

THE COURT: Yes, probably.

MR. HOLDER: Okay. That's fine.

THE COURT: Just remind me.

MR. HOLDER: Yes, sir.

THE COURT: Okay. Any other preliminary matters?

MR. HOLDER: I like you. You're a good guy. Okay.

THE COURT: Then stop alleging that I've been engaged

in misconduct.

MR. HOLDER: I really feel - - I don't even think you know it. I just think everyone - - Maybe I'm wrong. I just wish I could get some discovery that's all. I wish - - I just want to have my day in court. Do you understand what that feels like to work for three years and everything and know everybody is lying about you and you just want to have your day in court when you can finally make these guys tell the truth. And to never be able to get your - - It's just very frustrating. Maybe I'm just not good enough as a litigant.

THE COURT: Let's stop there a minute, okay. And we'll get back to this case here in a minute. Alright.

MR. HOLDER: Okay.

THE COURT: But the 371 case, *Young v. Holder*, how many days of trial did we handle, 3?

MR. HOLDER: I was on a timer. I felt like I was on a full court press man.

THE COURT: Well, we only had three, I think it was three days.

MR. HOLDER: We got almost everything in.

THE COURT: Yes. Okay. And I helped you get stuff in. Unless you forget, I helped you get exhibits in. Okay.

MR. HOLDER: I appreciate everybody's help.

THE COURT: You cannot say - - If you are saying at all that in the 371 case you didn't get your day in court I disagree. Okay.

MR. HOLDER: Okay.

THE COURT: Alright.

MR. HOLDER: That's fine.

THE COURT: Because I don't know how we can say a three day trial at which I guided you along was not your day in court. Ms. Peeples was there. Okay. This case, I understand your frustration because you have, you feel, I think, that you haven't had the opportunity to tell a jury in that box the story. Okay. And you argue that I have taken away from you your right to jury trial. You've argued it several times in different papers at times. That's fine.

MR. HOLDER: I feel that way. I do.

THE COURT: Okay. This case is interesting and it is complex. And I believe it requires certain decisions to be made by the Court and certain decisions to be made by the jury. Counts 1, 2, 3 and 4, are for the jury. Was there a trespass? Was there damage to trees? Should there be money paid? Those sorts of issues are Count 1, 2, 3, 4. Count 5 and 6 are one is Quiet Title and one I think is Ejectment. Okay. And within there is injunction. Okay. My belief as to the state of the law

of the State of Maryland is injunction is not a jury question. Only judges can issue injunctions. Okay. Number two, the determination of where a property line is in relation to a Quiet Title action is a question for the Court not for the jury. I believe that's the state of the law. Okay.

So, as a matter of courtroom efficiency clarity for the parties and the attorneys and importantly how much control do I want to put over the citizens of Washington County when I order them into that box for jury trial. I make a decision; I think there's of two ways to do it. Number one, I could have just started this whole thing out as a big jury trial. I think when we originally talked about it we thought this might take three weeks. Put a jury in that box for three weeks. Take three weeks of their lives, hear the entire case and at the end of it I could say, well, wait a minute. I have to decide where the line is not them. And Justin Holder has given me, I don't know, I'm just making up a number, right, a hundred pages of documents. Ms. Prawde has given me a hundred pages of documents. I've got to review this. I don't know that I'm ready. They've got motions and arguments. What do I do with those people for the week it takes me to decide the property line or the two weeks or the month? Do I send them home and hope they remember the

testimony? Can't do that. That's not efficient. That's not wise. What if in that jury trial I decide that the line isn't anywhere close where Estes says it is? It's to the east. I decide that all the waters on Uncle Eddie's property you couldn't possibly have trespassed. I've just wasted three weeks of their lives. So, as a matter of efficiency for court operations, as a matter of clarity for the attorneys, what issue is at issue and as a matter of not wasting the lives of the citizens of Washington County who I'm going to order into that box, I decided to chop this case up. Because the jury issues of Count 1, 2, 3 and 4 don't matter at all until I decide where the line is. Do you understand?

MR. HOLDER: I understand that reason.

THE COURT: And the reason it hasn't yet gone to jury trial yet, it's going to, if the Plaintiff wants to go, they're going to get their jury trial. You're going to get your jury trial. The reason it hasn't, the reason it's not today is I still think there's an issue up in the air as it relates to the property line and I don't want to leave that issue up in the air.

MR. HOLDER: Okay.

THE COURT: And have it still up in the air when you go to the jury. And that issue is really simple. What is your right, what is the right of the public, to walk

on the bottom of the street as it crosses his property? Because I've decided where the property line is. And should I issue and injunction? It's all one big issue to me, really. But I'm not leaving that issue up out in the air and have a jury trial on Counts 1, 2, 3, 4. I want everything that I'm able to decide to be decided before we go to trial on Counts 1 through 4. You're going to get your jury trial on Counts 1 through 4. But, do you understand that it was a planning issue and - -

MR. HOLDER: I understand why.

THE COURT: - - that makes you feel that you didn't get your jury trial. Wilkinson is against me. No. I'm trying to be organized and use the efficiency of the court rather than wait rather than waste the time of the lives of six people at least, maybe an alternate, seven, when I'm not even sure what I'm asking them to decide yet. Do you know what I mean?

MR. HOLDER: I appreciate that side of the coin but I feel that the issues of the whole dispute that the unclean hands that Fred defrauded me out of this property that then even failed to join the Hutzells we didn't apply the illegal subdivision ordinance, this little sliver of deviated land. I think that all of that being in front of a jury - -

THE COURT: I've already decided that on some - -

I've already decided the line on Summary Judgment - -

MR. HOLDER: I know you did.

THE COURT: - - and you may disagree with me and you're allowed to disagree with me, Mr. Holder. And that can be an issue on appeal. But I've already decided the property line.

MR. HOLDER: Well to that extent that's why I asked you to certify it as 2602(b) lock in the line on appeal and then we don't waste any jurors time at all because we could have a whole trial. I could go up on appeal where the line is. I could win. And then we have to have a whole other jury trial. That's also equally inefficient and I'm placed in a severe disadvantage in a jury trial once you've decided the line is, you know, wherever, and at what point, you know, I signed a plat and now I've given up line or, you know, land for Uncle Eddie that I didn't even the surveyor refused to even tell me this.

THE COURT: Okay.

MR. HOLDER: I mean, that, anyway, that's why I was upset. It's not necessarily that I don't think you have a good point for doing what you're doing.

THE COURT: I just - - I know you're concerned that you feel you've not gotten a jury trial and there is a reason. It hasn't happened yet. And the reason it hasn't happened yet is because I believe there are

certain issues that need to be decided by the judge and by the judge only and I don't feel that the case is ripe to be in front of a jury until those issues are decided and that's what we're here for today.

MR. HOLDER: I understand.

THE COURT: To decide the remaining issues that I believe are still ready of a judicial determination. One, what is the law of the State of Maryland. Two, should there be an injunction. Okay.

MR. HOLDER: Okay.

THE COURT: Okay. I just wanted to make you feel comfortable about - - I know you're worried that you didn't get a jury trial. And you will, it's just not today.

MR. HOLDER: No, that's okay.

THE COURT: Okay. Are we on the same page then? Do you understand what I'm saying?

MR. HOLDER: I do. I mean, like I said, you make a good argument.

THE COURT: It's not an argument. It is the way it is.

MR. HOLDER: When you make it it's the law so.

THE COURT: Well - -

MR. HOLDER: I get that.

THE COURT: - - it's the procedure.

MR. HOLDER: And I respect that, Your Honor. I do respect that.

THE COURT: It's the procedure. Okay.

MR. HOLDER: I respect that very much.

THE COURT: Alright. Okay. Any other preliminary matters before we get to opening statement?

MR. HOLDER: If Mr. Estes wants the Hutzell estate injuncted maybe he failed to enjoin them in the quiet title?

THE COURT: I'm not here to enjoin the Hutzell estate. I'm not exactly sure what you're talking about. You have to bring that up to me later. I'm not exactly sure what you're talking about. I read your objection but.

MR. HOLDER: It's an objection. I'll just stand on that. Just the objection to it.

THE COURT: Okay. It's overruled and denied at this point. If you wish to raise it again you may.

MR. HOLDER: Okay, thank you.

THE COURT: Are we ready for opening statement?

MR. HOLDER: Yes, sir.

THE COURT: Go ahead.

MS. PRAWDE: Thank you, Your Honor. As the Court is aware Summary Judgment has already been granted in Plaintiff's favor as to the issue of the location of the

boundary line between Mr. Estes property and the property owned by Uncle Eddie's. Plat 9186 is recorded in the land records in 2007. It shows the boundary line between Mr. Estes property and Uncle Eddie's property as is indicated on Plat 10955.

As part of the Quiet Title action Mr. Estes is first seeking an injunction enjoining the Holders from entering the property. Mr. Estes will testify as well as his wife that they purchased their property over a decade ago, twelve years ago, because they value their privacy. They enjoy their privacy that's afforded to them by this property and they do no want members of the public or their neighbors, including the Holders, essentially walking through their backyard. And they are concerned about their safety, the safety of individuals who come onto their property. Based on plats 9186 and 10955 and the Court's Summary Judgment ruling it's going to be the position today that the Holders should be enjoined from entering onto Mr. Estes land. And he had not specifically talking about the land under the water but the land in general.

Mr. Estes will irreputabley harmed should there be a continued trespass onto his land. The balance of conveniences are in his favor as the Holders have no right to be on his property as defined by the plats that

have been entered into the land records and the public interest in protecting property rights as extremely strong.

And secondly and we sort of view this as part of the injunction. I don't know sort of how we're framing it all today but as part of this injunction Mr. Estes is requesting that there be an injunction as to the bed of the two parts of the creek that run through Mr. Estes property the Little Antietam Creek and also beside the tributary is the Spring Creek, both of which run through the property as can be seen on plats 10955 and 9186. As the evidence will show if we get to that point but as well as legal argument, which I'd like to be heard on separately. Mr. Estes is entitled to an injunction prohibiting the Holders from walking these areas of Little Antietam Creek and Spring Creek. This relates to the other remaining legal issue. So, whether the Holders can be enjoined from walking on, making contact with the bottom of Little Antietam Creek as it traverses inside Mr. Estes' property line.

There will be testimony, again, if we get to that point, or I think can be clearly shown from the plats, neither Uncle Eddie's nor the Holders own any land that borders, abuts or fronts Spring Creek. They could only access it by crossing over Mr. Estes' property. They

have no repairing rights at all to Spring Creek. Uncle Eddie's property only abuts part of Little Antietam Creek in one very small point, which can be seen from the plat that runs through Mr. Estes property.

Mr. Estes is not seeking to enjoin the use of water in the creek as it's been stipulated to in the stipulation with DNR as well as I believe a dismissal order that all of the (unintelligible) were a part of the right of the waterway to be used is not, the water itself to be used, whether that's kayaking, floating, um, on any sort of waterway that's considered navigable is now something that's at issue here. Which really at issue, practically speaking, is Mr. Estes is seeking an injunction from the Holders being able to walk on the streams, the creeks that go through his property, which, again, if we get to that point, there will be testimony and large parts of the creeks ankle deep, inches deep. This is not a creek where someone can be going throughout the whole Little Antietam Creek or Spring Creek in a kayak, in floatation device, any other means of transportation.

Um, the times that Mr. Estes as will be testified to has seen the Holders on his property was doing just that, walking in ankle deep water through the creek, through his backyard. He is not going to be testifying that he

has seen them kayaking or - - Or he will testify he has never seen them kayaking or floating in the water. And, again, that's not something that's seeking to be enjoined here. It's really this issue of their ability or anyone's ability to walk through ankle deep creek in Mr. Estes' backyard or any other use for someone that is touch the creek bottom or crossing over his property in order to get to these creeks.

Again, you will hear, if we get to this point, for Mr. Estes and his wife Lisa Estes, who will testify in the twelve years that they have lived there that they walk the property multiple times a day, largely because they have dogs that they take for long walks. So, they can certainly speak to the water levels, the terrain, rocks that block the creek. They, wide latitude is given property owners to be able to describe their property. That is exactly what they would be doing here if we get to that point. They're extremely familiar with, again, the water levels in the different areas of the creek and the fact that there's on ebb and flow of the creek. The section of these creeks are not frequently used by the public as the Estes will testify in the twelve years they've lived there the Estes have seen children walking in the creek on just two occasions and a man fishing on just one occasion. And then the few of the instances

where they've seen the Holders on their property. Other than that, the twelve years of regular walking the creeks they have never seen individuals kayaking, canoeing, in floatation devices, anything like that.

And this is going to briefly touch on my legal argument but just a little bit of an overview. Um, in Maryland title to navigable waters, the soil underneath are largely vested in the State. The public has the right to navigate over the parts of the water that are navigable. The parts of Little Antietam Creek and Spring Creek that are on Estes' property are not navigable. And we have case law that we will discuss and that was included in our Supplemental Bench Memorandum. In Maryland in determining whether a creek or a body of water is navigable courts have primarily looked at the ebb and flow test whether the water ebbs and flows at the tides as well as the navigable and fact test, which primarily means whether boats, similar transportation devices can navigate down a body of water.

The evidence will show that Little Antietam Creek and Spring Creek are not subject to the ebb and flow tides. That the water is not navigable and therefore the, the creek bends are fully owned and within the rights of Mr. Estes and not subject to members of the public or neighbors being able to walk across them.

Again, there be testimony that one could not fully navigate down either of these creeks. Certainly, there are no boats that will be going down the creeks and we have plenty of pictures that we would admit into evidence if we get to that point demonstrating that. And the idea of navigability just overall in Maryland law is largely about this idea of transportation and navigation in a body of water by boats or vessels. Not about whether someone can walk in ankle deep water in someone's private property. Because these creeks are non-navigable, there's no public right to be walking or standing in the creek beds on Mr. Estes' property.

And just, Your Honor, so, Mr. Estes rights to the creek, I'm sorry, rights to the land under the water of the creek on his property would prohibit the Holders from using the creek bed within his property line. The Holders should be enjoined from entering onto Mr. Estes entire property, which includes walking or standing in the beds of the creek. Thank you.

THE COURT: Thank you. Ms. Peeples, thank you.

MS. PEEPLES: Good morning, Your Honor. Brandy Peeples, again, on behalf of Dina Holder who is really not involved in this case but sort of is. And I am here, number one, to preserve the record because I do think that the ultimate decision of how Your Honor rules holds

bearing on the proceedings that go forward as you previously stated. I think that the Plaintiff is making an assumption that because the creek, Little Antietam Creek is ankle deep that it's non-navigable. The pictures and in everything that's produced in discovery one of which I recall Mr. Estes standing in the water with a ruler. Unfortunately, that's a laymen. I think that the case law is clear number one, that navigability is a question of fact.

And I disagree with Ms. Prawde in terms of the ebb and flow because Maryland has since taken a different approach. Maryland - - and let me back up, Your Honor. There's, there's a principle in Maryland law called the Public Trust Doctrine. And that's a property law doctrine where the State kind of holds in trust the beds of a river or waterway for public use. The condition is that those beds or waterways have to be determined to be navigable. And if, if the State has determined that the waterway is navigable then people have the right to walk in the stream, to go fishing in the stream, to kayak down the stream. And I think the evidence will show, number one, that the Little Antietam Creek is designated as a Class 3P waterway by the Maryland Department of Natural Resources which does permit uses such as fishing, kayaking and other recreational uses. That evidence will

come into play.

The whole idea of navigability stems from Supreme Court law. In *United States versus Utah* and the *US Appalachian Electric Power Company*, 311 U.S. 377 (1940). The Supreme Court held that so long as the water is susectible to use as a highway of commerce it is navigable in fact even if the water has never been used for any commercial purpose. That's at *U.S. v. Utah* at 8183. The question of the susceptibility in the ordinary condition of the rivers rather than of mere manner or extent of actual use is the crucial question. In *U.S. versus Appalachian Electric Power Company*, 311 U.S. 377 at 416, "nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.

I then direct your Court to Maryland or this Court to the Maryland test. And that's been enunciated in *Gray versus Gray*, 178 Md. 566. "The test of navigability in Maryland is whether the waterway is susceptible of use in their ordinary condition as highways of commerce over which train and travel are or may be conducted in the custom, in the customary mode of travel."

Taking that further *Havre de Grace versus Harlow* says that natural conditions of the stream are a question of

fact. And *Harlow* also goes further to say that even the floating of a log down the stream could be constituted as commerce to render a stream navigable. You don't necessarily apply ebb and flow as one basis to determine whether or not a waterway is navigable.

To that extent, having given Your Honor (unintelligible) case law and I'm more than happy to provide a Bench Memorandum, which I started writing last night following Ms. Prawde's, I will that in the next, either today or tomorrow outlining these cases. I would argue that the question navigability as a fact for this Court requires a lot more than the Plaintiff has produced in evidence. Standing in a stream that's ankle deep, and again, when you're looking at this whole body of law, most cases that I've reviewed, and I've reviewed a lot of them in preparation for today, have expert testimonies, whether they're fisherman, whether they are captains of boats, whether they are members of like the Department of the Environment. There are a lot of opinions that go into the determination of whether or not a river is navigable. There are facts that have to be looked at. Measuring a river in one place while it may be low in one place does not render it not navigable if it is susceptible to commerce in another place.

THE COURT: Oh, I might disagree with you on that.

MS. PEEPLES: Well - -

THE COURT: I think there's case law that suggests that a river can be navigable in parts and non-navigable in parts such that the ownership does change.

MS. PEEPLES: I would agree on it. I know the case that you're talking about.

THE COURT: Okay.

MS. PEEPLES: But what I am saying here is that there hasn't been enough evidence produced - -

THE COURT: Well, I don't know yet. We haven't had the trial.

MS. PEEPLES: Well, no, what I'm saying is, I've looked at discovery, Your Honor.

THE COURT: Okay.

MS. PEEPLES: And the discovery produced in this case is all of a layman opinion. There are no experts and I would submit to this Court that expert testimony is required as a prerequisite to making the determination as to whether the waterways in this case are navigable. I would also suggest that the Court has to follow - - Even if - - Even if the Court follows a layman's principle we can't ignore we can't ignore (unintelligible) in the actual understanding of a methodology in how you determine whether something is navigable. Measuring something at one, at one spot maybe in the month of July

might yield a very different result in measuring the same creek in January or February or March when it's a rainy season.

So, I think that you have to do a constructive analysis of this river not based on certain times of the year to make that determination. And based upon the discovery in this case I think that the Plaintiff - - If there's evidence out there that we haven't seen, the Plaintiff certainly, there's been no expert offered.

THE COURT: Okay. I understand and I think this is argument that you can - - So, I understand. You're going to argue, hey there's not enough evidence or, and or there's not expert testimony.

MS. PEEPLES: Correct. And that's really the position of the Court.

THE COURT: Okay.

MS. PEEPLES: I just wanted to brief the Court also in connection with the applicable law.

THE COURT: Can you give me the Supreme Court cite?

MS. PEEPLES: There's two Supreme Court cases that I looked at. One, *U.S. versus Utah*, 283 U.S. 64, that's - -

THE COURT: Slow down.

MS. PEEPLES: I'm sorry, Your Honor.

THE COURT: 283 U.S.

MS. PEEPLES: 64, that's a 1931 case.

THE COURT: Yes.

MS. PEEPLES: U.S. versus *Appalachian Electric Power Company*, 311 U.S. 377.

THE COURT: 311, U.S. - - What was the page?

MS. PEEPLES: 377.

THE COURT: 377. Okay. I have *Gray* already.

MS. PEEPLES: That's a 1940 case. And *Havre de Grace versus Harlow* is - - I wrote it down and I have it right here, Your Honor. Hang on. Bear with me.

THE COURT: It's okay.

MS. PEEPLES: *Havre de Grace versus Harlow*, is 129 Md. 265.

THE COURT: Okay.

MS. PEEPLES: And I'll submit that most of these cases are old because the law is quite well settled.

THE COURT: Yes.

MS. PEEPLES: Thank you.

THE COURT: Frankly, I'm not sure that you and Ms. Prawde disagree all that much on what you're arguing. Alright, Mr. Holder. Alright, Mr. Holder, before you start. I'm going to do something odd here.

MR. HOLDER: Yes.

THE COURT: I'm going to wash away that you took the oath.

MR. HOLDER: Okay.

THE COURT: Because now you are a litigant. You are giving me an opening statement. So, to whatever - - I don't know that I have the authority to take away the oath but I'm doing it based on the argument that you raised. I don't want you to feel that you are being treated unfairly.

MR. HOLDER: It was just that the - -

THE COURT: I will remind you that these attorneys have an obligation to tell me the truth and you're here representing yourself. I hope that you would feel the same obligation.

MR. HOLDER: I do.

THE COURT: Okay.

MR. HOLDER: And I would expect that if you ever found that I wasn't that you would discredit what I say in the future. So, I know I'm still under the same. Okay. So, you know, between - -

THE COURT: And, again, this is just opening as to what we're doing today, okay.

MR. HOLDER: The law that Ms. Peeples, this is from the appendix of the EPA. Okay. And we know that what's navigable waters if you're dealing with certain, I think the Obama Administration said puddles were navigable water because the EPA wants regulatory authority.

This is their determination of exactly how they find waters to be navigable and fact. Once it's navigable in fact it's navigable in law. Once it's navigable in law it can never be revoked. The federal government never gives up anything.

I have CFR law here, which is improved or natural conditions of a water body and specifically at, I want to say it's, Federal 33 CFR, Section 329.8(b). Titled Non-Existing Improvements passed their potential. And they basically say, "Thus if an improvement were reasonable at the time of the pass the water was there for a navigable in law from that time forward." So once the government determines it's navigable it just is.

Section 33 CFR at 329.14 Determination Navigability. A. Effect on Determinations. Although conclusive determinations of navigability can be made only by federal courts those made by federal agencies are nevertheless accorded substantial weight by the courts. They had, you know, just they listed in C just a ton of different documents they would use to make that decision. So, that maybe would be some of the factual evidence this Court could consider in reviewing the same standard of review.

THE COURT: Which, I'm sure you will bring those standards up again during the trial. Why don't you give

me those citations again?

MR. HOLDER: Oh, okay. Uh, 33 CFR 329.

THE COURT: Slow down. 33 CFR 329.

MR. HOLDER: .14.

THE COURT: .14.

MR. HOLDER: And .8.

THE COURT: And .08?

MR. HOLDER: Yes.

THE COURT: Okay.

MR. HOLDER: And that's all derived from the 1899 Rivers and Harbors Act. And that's actually now it's 33, codify is 33 U.S.C. 403. And specifically at Section 10 of the Rivers and Harbors Act, it requires authorization of the Secretary of Army acting through a court of engineers for the construction of any structure in or over any navigable waters of the United States, any dredging disposal, excavation of the bed. And these are the United States what they consider to be navigable in fact rivers.

THE COURT: When I look into these code sections - -

MR. HOLDER: Yes.

THE COURT: Am I going to find definitions of what are navigable waters?

MR. HOLDER: Absolutely.

THE COURT: Okay.

MR. HOLDER: They talk about tributaries and everything.

THE COURT: Okay.

MR. HOLDER: It's very - - They're, they're very detailed these code sections. And they're all - - Actually that's where these, you know, where Mrs. Peeples was citing the cases.

THE COURT: Okay.

MR. HOLDER: I got that right off the EPA sight of how they make their determination, the case law they rely on.

THE COURT: Okay.

MR. HOLDER: And then these are the reliable - - And basically they said, hey, there's insufficient evidence in this case of *Alaska vs. Aetna Incorporated*. And I can just give you this.

THE COURT: Hang on. I think we're jumping ahead okay. We're in opening statement right now.

MR. HOLDER: Oh, okay.

THE COURT: For you just to tell me - -

MR. HOLDER: Oh, okay.

THE COURT: It's okay. We're going to go back to the law of the water here in a moment.

MR. HOLDER: Gotcha.

THE COURT: But I understand that you're probably

going to take the similar position that Ms. Peeples is. Is that under any test of what is navigable this water is navigable. Is that the position you're taking today?

MR. HOLDER: No, I'm taking the position that navigability is really irrelevant to the repair (unintelligible) owners access to the water just like Ms. Prawde cites in her case law it's ad filum medium sub publicum. Per the 1862 charter of the King, which is the Doctrine of Public Trust. So, we have the rights to fish the waters drown upon the shores and that's actually brought in under Department of Natural - -

THE COURT: Okay. Let me slow you down. So, you're not so much arguing that your right to walk along under, to walk through the water, right?

MR. HOLDER: Right.

THE COURT: Let's just call it that because that's what we're talking about.

MR. HOLDER: Wading. Wading.

THE COURT: Wading through the water. Just walking through the water.

MR. HOLDER: Right.

THE COURT: From the Uncle Eddie's property - -

MR. HOLDER: Uh huh.

THE COURT: - - across the property line where I found the property line to be. I know you disagree with

that. Onto the Estes property where the water runs within the Estes property. You are not so much making the argument that the creek is navigable and therefore as a member of the public you have that right. But rather you as a neighboring owner have the riparian right to walk through the water of a neighbor that is on a neighbor's property.

MR. HOLDER: As a licensee I'm making that argument. I'm also - -

THE COURT: What do you mean as a licensee?

MR. HOLDER: Licensee of Uncle Eddie's as you know, right.

THE COURT: Yes.

MR. HOLDER: And the guest invitee or whatever.

THE COURT: And whether you're a, an original form - -

MR. HOLDER: Whether it's my alter ego - -

THE COURT: - - original member of Uncle Eddie's or whether you are the current member of Uncle Eddie's or whether you're the manager of Uncle Eddie's, Uncle Eddie's is a related entity to you. And so, as a related person to Uncle Eddie's, Uncle Eddie's has the riparian right to walk from Uncle Eddie's property into the water and northeast through the stream even as the stream crosses into Mr. Estes property.

MR. HOLDER: Very similar to a roadway.
THE COURT: Okay.
MR. HOLDER: Basically, um, as - -
THE COURT: But you're basing it on - -
MR. HOLDER: It's appurtenant.
THE COURT: You're basing it on riparian right instead of navigability on the water.
MR. HOLDER: That's one.
THE COURT: Okay.
MR. HOLDER: The other is also the public's use of the creeks as public transportation on a public highway because once you're in the water - -
THE COURT: Because it's navigability.
MR. HOLDER: Whether it's navigable or not the creek, the common - - I'm going to bring in George Naugle who's going to testify and he's already given his opinion to the Plaintiff. I have the U-tube clip where he gave it to him. And Mr. Neil questioned him on it and he said the creeks and the public's highways, they were the public's highways before. Also, the legislative intent behind House Bill 767 that says the creeks for the public's highways. We got to give people access to these creeks.
THE COURT: House bill what?
MR. HOLDER: 767.

THE COURT: What year?

MR. HOLDER: 2013.

THE COURT: But do you understand - - I just want to make sure we're on the same page a little bit.

MR. HOLDER: I'm sorry. 797. House Bill 797.

THE COURT: 7, hang on. 2013?

MR. HOLDER: 2013, correct.

THE COURT: Okay. So that - - So that there's no confusion here, so that there's no confusion, I don't think Mr. Estes is saying in this litigation, and Ms. Prawde you correct me if I'm wrong, I don't think that he is saying in this litigation that the public, including you, have the right to get on a canoe or a raft or a kayak and kayak that water, the top of the water. And that was the stipulation he made with the State of Maryland.

MR. HOLDER: I'm not - -

THE COURT: His - - stop. His position he is taking today, Ms. Prawde correct me if I'm wrong, is that the public, you included, do not have the right to step on the bottom of the creek and walk it. And I remember because of navigability or non-navigability. He is not asking me to enjoin anybody including you from rafting, from kayaking, from canoeing. He is asking for an injunction that you not be able to walk the bottom

because nobody in the public is allowed to walk the bottom and the reason the injunction is against you is because you're the one that's done it. He's got a video of it, allegedly.

MR. HOLDER: Right.

THE COURT: If somebody else was doing it that he wanted me to enjoin he'd have to file a different lawsuit against that person specifically. Do you understand? He's not saying that you can't - - Am I right on that?

MS. PRAWDE: That's correct, Your Honor.

THE COURT: Okay.

MR. HOLDER: I absolutely understand that.

THE COURT: So, this is a question - - This case is about walking the bottom not rafting, not kayaking, not canoeing.

MR. HOLDER: And the King - -

THE COURT: I would not enjoin you. He's not asking me to and I would not enjoin you or your family from kayaking, canoeing, rafting on the top.

MR. HOLDER: Okay.

THE COURT: It's only the walking.

MR. HODLER: But, I'm going to show you documents that we certainly can walk. That was the intent of the King when he gave us rights for fishing and navigation.

THE COURT: And that's fine.

MR. HOLDER: Okay.

THE COURT: Okay, okay. So, you are going to try to show me that the law is that this whole issue of navigability really doesn't matter.

MR. HOLDER: Doesn't even matter.

THE COURT: Because you're allowed to walk anyways.

MR. HOLDER: You're allowed to walk anyways.

THE COURT: Okay.

MR. HOLDER: That's what I intend to show you on that.

THE COURT: Okay.

MR. HOLDER: The third thing I'm going to show you is the prescriptive use of the public that has been hostile, open, notorious and continuous for so long that perfect title to easement and grace has been vested in the public.

THE COURT: Okay. Okay.

MR. HOLDER: Okay.

THE COURT: Okay, good. Alright. Let's see here. Can we take a five minute break?

(Whereupon at 11:25 a.m., court was in recess and resumed at 11:31 a.m., and the following occurred in open court:)

THE COURT: Okay, back on the record. Estes versus Holder, C-21-CV-20-430. Okay. I know I've heard a

little bit of it already. But I would like to begin with the legal argument concerning the water law of the State of Maryland. Just so that I have a firm basis on what you're going to be saying and when we get to the testimony portion of these proceedings I also understand that Ms. Peeples you may choose if you want to file a Memorandum. If you feel that you want to, I'll certainly accept it.

MS. PEEPLES: Thank you, Your Honor.

THE COURT: Alright. Ms. Prawde, do you wish to be heard concerning the issue of the law of the State of Maryland concerning navigable, non-navigable, what's it mean.

MS. PRAWDE: Yes, Your Honor. And may I pass up a hard copy of the Bench Memorandum unless Your Honor already has it?

THE COURT: Yes, please. I don't have it. Thank you.

MS. PRAWDE: And, Your Honor, we have focused in our Bench Memorandum and in our argument today on what the law of Maryland is. Maryland has had a number of cases addressing navigable water, non-navigable water, may of which we recite in our Bench Memorandum. And those have relied on the established case law in Maryland about the different tests that are applied. Ebb and flow tests,

navigable in fact that are not relying on federal regulations or U.S. Supreme Court cases. There's a well established law in Maryland. As Ms. Peeples said that it goes back for quite some time ,which is why hers, the case that she cited are older, many of ours are older as well.

THE COURT: Some of the cases talked about going back to Lord Baltimore and his grant from the King.

MS. PRAWDE: Yes, it was hard to try to find some more recent cases - -

THE COURT: It was kind of interesting.

MS. PRAWDE: - - but ended up on just relying on some back in the 1800's which tend to avoid but. In this case sometimes you have to do it.

THE COURT: Go ahead. Sorry to jump in.

MS. PRAWDE: No, that's okay. So, in Maryland the common law is clear that title to navigable water into the soil below is largely vested in the State. However, emphasis on the word navigable there. The public has a right to navigate over every part of a common and navigable river. That does not give the public a right to walk or to navigate over a non-navigable river or creek.

And in terms of the bed of a non-navigable stream or creek we cited from the Court of Appeals, it's *Melvin vs.*

Leisinger, 138 Md. 337, a 1921 case. As well as *Linthicum vs. Shipley*, 140 Md. 96 (1922). There is says that the prima facia presumption is that riparian proprietors on non-navigable streams own the soil covered by such rivers *ad filum medium aquae,* which I probably just butchered. But, essentially that means to the middle of the creek.

Here this is a situation though where the creeks largely run directly through Mr. Estes property. Um, there's no property owner on the other side who would have rights to the soil up to the middle line. As Your Honor would have clearly see where Spring Creek is the tributary that goes off of Little Antietam.

THE COURT: Do you mind walking up there and showing me where Spring Creek is?

MS. PRAWDE: Sure.

(Ms. Prawde steps away from trial table to the easel with map which is not marked as evidence yet).

THE COURT: Can you spin that my way?

MS. PRAWDE: I will attempt to.

THE COURT: That's good, that's good. I just want to be sure that - -

MS. PRAWDE: So, we're talking about Little Antietam Creek running up here.

THE COURT: Yes.

MS. PRAWDE: And then Spring Creek is what I'm referring to when I'm referring to this.

THE COURT: Understood. Okay. I got it.

(Ms. Prawde returns to trial table.)

MS. PRAWDE: So, there the Court of Appeals has made clear that riparian owners as to non-navigable streams or creeks. They are entitled to ownership of the bed of the stream. That would be part of their property that they would have ownership rights to that part of the property. And the Court of Appeals decided the withdrawal of the water neither increases nor diminishes the validity of that property owner's title nor changes it in any respect. It merely changes the character of that which was his before and it enables him to possibly use it to different uses.

And we also cite in our Memorandum a treatise it's Robinson and Tarlock Law of Water Rights and Resources Section 3.334 that says that the beds of non-navigable rivers and lakes are presumed owned by the riparian owner.

We also cite to *Van Ruymbeke vs. Patapsco Industrial Park*. It's 261 Md. 470, it's a 1971 case, where it again says that if there is a private river if the bed is left bare by a sudden recess of water the relict land remains that property of the former owner. So, if one has

property of the soil of the river, the public river and the bed is left bare by a sudden recess the relict land will remain his because in each case the property in the soil is in him.

And talking about the tests that are well established in Maryland as to determining navigability, um, the course largely apply the ebb and flow of the tide test as well as the navigable and fact test. Cases, courts in Maryland have said that often times that is one in the same. If it's an ebb and flow of the tide there's often going to be the ability to navigate to take a boat or another similar device down a creek or a waterway. So, it's clear in Maryland that waters are not considered navigable if and only if they're subject to the ebb and flow of the tides. And we cite to several Court of Appeals cases in our Memorandum on that issue. And then as well as the navigable and fact test whether waters in their natural state are in fact navigable. We cite to *Green vs. Eldridge*, that's 230 Md. 441, as well as *Gray vs. Gray*, 178 Md. 566, in which the navigation in fact test was applied. In *Green* in particular the Court there found that the stream at issue was navigable based on testimony by both parties about the water depth and traffic of small boats in the disputed area. I'd have to look back. My understanding is that was just testimony

from the parties related to water depth and any sort of history of boats not any sort of expert. Again, I would need to double check that but I believe it was just the parties who were permitted to testify that and what the Court considered in their ruling. And, again, there were small boats. There were boats that were able to be transported down the water which is a reason largely that the Court found that it was navigable in that case.

And, we cite to the *Harlow* case, which I believe Your Honor may have been referring to earlier about this issue as to whether parts, even if part of a creek is navigable or not navigable that, well, if part of a creek is navigable that does not make the entire creek navigable just as if part of a creek is not navigable it does not make the entire creek non-navigable. So, there may be circumstances where a large majority of a creek is non-navigable, where there is no Ebb and flow of the tide where there could be no navigation but there may be a small part of that same creek where it gets deep enough where there could be some sort of transport there. And that was similar in the *Green* case there. The Court held that there was a portion of the stream that was considered navigable as it not necessarily apply to the entire stream (unintelligible) being navigable.

And sort of the last piece I just want to touch on in

terms of riparian landowners rights. Um, so, we cite to a couple cases in our Memorandum. There are plenty that abound in Maryland on this issue. But one who owns the land. So riparian, a riparian landowner who has riparian rights is one who owns land that borders upon, is bound by, fronts upon, abuts, or is adjacent to or in contact with a body of water, such as a river, bay or stream and creek. So, it actually has to abut. It has to be adjacent to. It can't be a situation where regardless how little the strip of land may be if someone else owns the land in front of their property they're not a riparian landowner. They have to abut the water itself. And we cite to the *Becker* case, which says that a riparian owner has a right of access to the water in front of his vast lands. Just because a riparian owner may abut or be adjacent to one particular part of a stream his riparian rights are limited to that area right in front of his property that does not give that individual rights to the entire stream where you couldn't see the house or anything beyond the property it's limited to what is just in front there.

And, Your Honor, court's indulgence for just one moment.

MR. ESTES: Your Honor, if I may address the Court?

THE COURT: Hang on.

MR. ESTES: Sure.

MS. PRAWDE: Your Honor, Mr. Estes would like to make one point related to the Woodlands Exception if I may allow him to address the Court on that law.

THE COURT: Well, he's here represented by counsel so I'd rather hear from counsel.

MS. PRAWDE: Yes, Your Honor.

THE COURT: It's certainly something you can bring up later.

MS. PRAWDE: Um, I may need to do that, Your Honor. Thank you.

THE COURT: Sure. Anything else then?

MS. PRAWDE: No, Your Honor. Thank you.

THE COURT: Ms. Peeples, I know you gave me some of it earlier, but if you wish to be heard.

MS. PEEPLES: Thank you, Your Honor. I'm going to be brief because I really don't think Ms. Prawde and I, as you correctly pointed out, disagree in what the law says and what the law is. I do believe that expert testimony is required to make the determination of navigability but the one point that I want to stress to this Court that I think is an important distinction between my client's interpretation of the law and Ms. Prawde's interpretation of the law and it's not even remotely addressed in Ms. Prawde's Bench Memorandum is this whole notion of the

Public Trust Doctrine. I want to refer the Court to *Diffendal vs. the Department of Natural Resources*, which is actually a more recent case, 222 Md. App. 387. Now, the case it dealt with a, a land lease I think for oystering and fishing and what not but in that case an actual lease of the land trumped the Public Trust Doctrine. But I cite this case for the purpose of the fact that it says what the Public Trust Doctrine is and that is again hinging on the word navigability. "The navigable waterways was in Maryland's boundaries and the lands beneath them generally are, "held" by the state for the benefit of the inhabitants of Maryland. And then it goes on to cite other cases. *Anne Arundel County vs. City of Annapolis* at 352 Md. 117. *Clickner vs. Magothy River Association* 424 Md. 253.

So, under this doctrine, which I think the Court must consider when you look at the issue of navigability, is that the State holds those public lands in trust meaning we're not trying or the State is not trying to devest Mr. Estes of ownership. I don't think that there's any disagreement that he owns title to those lands that are under the water.

The real question this Court needs to figure out is one, if the waterway is navigable and the Public Trust Doctrine applies Mr. Estes title still holds true but it

doesn't preclude the trust of the State from allowing the public to be in those waterways. And the distinction and the important language that I wanted to stress to this Court is "and the lands beneath them." So, if - - It's almost like a but for argument. If this Court finds that the Little Antietam Creek is navigable then Maryland does the Public Trust Doctrine apply and Maryland hold that land beneath it for the use of the public. If that question is yes and answered yes then Mr. Estes although he retains title to the land and his title is completely clear from any claims can he preclude the public from walking on the bottom. And under the Public Trust Doctrine, Your Honor, I would submit that that answer is no.

THE COURT: All hinged on navigability.

MS. PEEPLES: Correct.

THE COURT: Right.

MS. PEEPLES: And that really - -

THE COURT: You're saying the same - - I think - -

MS. PEEPLES: Yes, we are saying the exact same thing.

THE COURT: It's a slight distinction as to whether it is ownership or whether it is public trust by the State of Maryland.

MS. PEEPLES: Correct.

THE COURT: Yes.

MS. PEEPLES: Ownership, the public trust of the Public Trust Doctrine that Maryland holds means people can walk on it. But it doesn't mean that Maryland actually has title, it doesn't mean that Maryland supersedes Mr. Estes title in it.

THE COURT: I hear you.

MS. PEEPLES: It just means that it's kind of this overlay of the public can use it.

THE COURT: Okay.

MS. PEEPLES: And that's really the distinction I wanted to make and hasn't been addressed.

THE COURT: Except the case you just cited was an oyster case.

MS. PEEPLES: Correct so if - -

THE COURT: So, let us presume that it was an oyster case out in the Chesapeake Bay, right.

MS. PEEPLES: So, that case - -

THE COURT: The Chesapeake Bay, the land underneath, I guarantee you is owned by the State of Maryland.

MS. PEEPLES: Correct. The issue and the difference is that the Natural Resources Article allows certain land leases underneath of the water for fisherman, oysterman and those kinds of things so as the State cannot and the public cannot interfere with the use of those. And

that's a completely different situation than we have here. And I, you know, I'm not trying to be remiss or cagey, I'm just pointing out that the Public Trust Doctrine as of 2015 is alive and well and if in fact the Natural Resources Article and I can pull up the Natural Resources Article that cited which is inapplicable to this case there are no land leases applicable to the Little Antietam Creek.

THE COURT: No.

MS. PEEPLES: So, I mean, I just cite this for the proposition that as recently as 2015 the Court acknowledged existence of the Public Trust Doctrine.

THE COURT: Right, that there's an issue of Public Trust Doctrine that needs to be considered.

MS. PEEPLES: Correct.

THE COURT: I hear you. Okay.

MS. PEEPLES: Thank you, Your Honor. Mr. Holder.

MR. HOLDER: Your Honor, I just disagree with both of the relevance of navigability to any of this because the King's Charter in the Public Trust Doctrine applied to the creeks and rivers of the State. If you just read the plain language in the 1632 Charter that cited in *DNR vs. Ocean City,* 322 A.2d 630 - -

THE COURT: Slow down. 320 - -

MR. HOLDER: 322 A.2d 630 Md. (1975). It relates to

Kings Charter back to Justinians of the Roman. And the seashores as far the greatest winters flood extents the things common to man are the water and the air. This is the *magna carta*. And I know that Mr. Estes feels that he has a bundle of sticks and he owns this land. But if you listen to Ms. Prawde she made a really good argument, *ad filum medium sub publicum*. We walk out there on Washington Street somebody owns that land underneath there. It might not be - - Maybe the State bought it in (unintelligible) maybe they didn't. But it's probably a state highway right of way. You get a pothole you're not trespassing. These are public rights of passage and before we had roads we had the creeks. Now, there's cases out there where people have gotten people kicked out for trespassing on the bottom. They're Indian deeds. Because the Indians gave the land patents different than the King did. The King in the colonial states is pretty much the rights of fishing and navigation which is to fish the waters and drive them upon the shores. That's the language I'm relying on. You can fish the waters you can drive upon the shores. She said that the riparian owners have the rights to the property and to the water. Even the fast lands and the relictions. You know, this little chunk up here that's under water sometimes during the year. So, you get the water when it gets high and it

runs through there that's the high water mark. I mean, this, this stream varies five and six feet. I've got - - You got at like Big Pipe Creek they have, they have a water trial in there. It's listed on the DNR's website. They said, hey sometimes - -

THE COURT: Okay, you're going to be able to show me that in the testimony.

MR. HOLDER: Yeah, I'll be able to show you that, yeah.

THE COURT: Okay.

MR. HOLDER: I can show you that.

THE COURT: How though? You're asking me to look back to the 322 A.2nd case that talks about the 1632 Kings Charter what that charter originally said, okay. How do you want me to deal with though the case law in State of Maryland that has occurred after that, that talks to, there's some case law that talks about the Kings Charter. It talks about Lord Baltimore. What Lord Baltimore's rights of grant of land and patents of land were, etc., etc., etc. But the case law seems to have evolved over time to more of what Ms. Prawde and Ms. Peeples are saying, which is the courts have landed on this idea of navigability being the central issue. So, I guess what I'm asking is, I just want to be sure I understand before we get going with testimony, are you asking me to ignore

the body of law that suggests navigability is the issue that I need to key in on and I need - -

MR. HOLDER: No, I just - -

THE COURT: - - to go back to this 1632 Kings Charter or do I not ignore navigability?

MR. HOLDER: No, I just don't think, I think you'll find that those cases are based on the 1862 statute where the State came in and said, hey, we want to control development. Anything under the ebb and flow of the tide is navigable waters of the State by law, by law they declared it. And the State owns everything. I mean the *Bowie* Court and the *Kennedy vs. Browne*, those cases that I cited in my Motion to Alter or Amend, those are really good cases and it says, like Ben, you know, like Mr. Estes is right. If you own to the edge of the creek you own to the center of the creek, *ad filum medium*. That's why you have this because you both have access. You both get in there; you both use the water for whatever. I mean, what, what if you don't have water in town, you want to go to the spring and get a drink, you know. I mean, some people in town don't have water. And you want to drink the water, you want to play in it. I mean when we were kids we used to lay in the spring and then jump out of the spring and jump in the warm water in the creek. It was probably warm because the (unintelligible)

sewage plant dumps in it but that's fine. We didn't care. We got impetigo. We were kids, we loved it. I mean, it's what people do.

THE COURT: Your parents didn't love it when you were itching all night.

MR. HOLDER: I got bleach dumped on me. Yeah.

THE COURT: I know.

MR. HOLDER: But that's what, that's what these creeks are when you by them. And all those cases nobody is challenging the rights of the public. And there's two really good case law out west because after the Constitution the way the land got divided up was from the federal sectional land grants. And if you look in *Colorado* in 1979 the Supreme Court did help hold a little bit of Mr. Estes position. They said, hey this Court has really backed the legislature in a corner because now if we come back and say you rule this way for Mr. Estes every other landowner in Maryland is going to say now it's a taking. People want to come in my land it's all a taking because now you've given him this other bundle of stick to exclude people off the bottom of the creek and I don't think that exists. I think you'll look through all those cases and you'll find that that right to walk up through these creeks has never been extinguished, terminated, abandoned by the State Government. It

certainly hasn't been abandoned by Uncle Eddie's. I'm going to show you a deed from Uncle Eddie's predecessor that gives Uncle Eddie's the right to the water courses of the Little Antietam Creek and the spring branch and the draft of water from the spring branch. I have that certified from Frederick County, 1777, Jacob (Pasachristian) has. All the lands of Gordan's purchase and you'll notice the predecessor deed of the Hutzells is part of Gordan purchase part of Fell foot and large.

So, these are the rights that unfortunately I think Mr. Estes redresses with legislature just like Mrs. *Kerpelman versus Board of Public Works* was she relied on Articles 6 of the Constitution, which is the government is so terrible they won't protect, you know they're taking my land and they said no, look, you have redress, go ask the legislature to rule that we, you know - - Look at the definition of waters of the State just in the environmental code it says the flood plain. That's very similar to (unintelligible). Where does the greatest winter flood extend? The flood plain. Do you notice Mr. Estes he said all these trees I cut down are in the flood plain through the state? Everything was along the creek. There's briars, there was fencing. Like stuff that people get their foot trapped in when the water gets up and you die. Just safety issues. Nothing, you know, I

mean it's just everything that happened, happened in what we call by definition the waters of the State, Environmental Article and DNR Code, I think it's, I got it written down here on the Environmental Code. It's gonna be probably 501(i)5 on the Environmental Code definitions in Maryland 801(g)(5) I think for the DNR. I'm going off my memory there but they were in my Motion to Alter Amend your judgment based on basically principle of *ad filum medium aquae*. The owners owned to the center that (unintelligible) *Bowie* court construes the Real Property Article that says hey if the deed goes to an edge of road goes to the center of the road. They construe it - - The Court shouldn't without express language in these deeds because there's a reason for these rules because it creates these terrible disputes. If you go to that big (unintelligible) deeds I could bring the deeds in.

THE COURT: But I already decided where the line is.

MR. HOLDER: I know. I know you did.

THE COURT: Okay. So, why should I be looking back at Environmental Articles that talk about to the center?

MR. HOLDER: Well - -

THE COURT: How does it relate to - -

MR. HOLDER: Because the lien - -

THE COURT: - - the water law of the State of

Maryland and injunction.

MR. HOLDER: The line is still in the flood plain, which the State of Maryland defines that as waters of the State and we stipulated that he's not contesting where the waters of the State are. We're just saying can I touch the land that. So, when that floods, right when it floods up I could just go, you know, kayaking down there he's saying. But whenever the water goes down I can't go over that little corner because the water level is down. Even though he said riparian owners are entitled to the reliction after the water when it goes up and down he, that, he didn't say that in the summary judgment. He says, oh no, you can't do that.

THE COURT: But as a riparian owner what allows Uncle Eddie's to cross his land to get to the creek?

MR. HOLDER: Well, because it's the fast lands that - - It's - -

THE COURT: If Uncle Eddie - - If Uncle Eddie's is a riparian owner on the south end of that creek, depending on where the line is, right?

MR. HOLDER: Yeah.

THE COURT: Why do you get - - Why does - -

MR. HOLDER: Can I - -

THE COURT: Yes, if you don't mind. Because you're talking about the little area. I just want to be sure

I'm thinking of - -

(Mr. Holder steps to easel with map.)

MR. HOLDER: This is perfect. So, when Mr. Frederick did his survey for me and provides the deed he says hey man we're going around the creek, going around the creek, whoop, going on land. Then he says we're back in the creek, we're down the creek, we're down the creek. Mr. Estes relies on that deed.

THE COURT: Generally, yes.

MR. HOLDER: So, here, we can get in, here we can get in and if you look at the - - I'll show you pictures. There's a trough right here okay. There's nothing ever grows right here because it's like all gravely. Nothing can grow there. And the water, when it gets up it will run through there. Hadn't done that for a couple years. I mean Boonsboro has drawn a tremendous amount of water from the ground. And it hasn't done that for a few years. When I was a kid in 1995 when we had all that snow that melted I actually saw - -

THE COURT: Okay. We're getting to the point of testifying at this point okay.

MR. HOLDER: Okay. Anyway, this is fast lands.

THE COURT: I just want to understand - -

MR. HOLDER: This here is all fast lands. And Judge Cathell in *White v. Pines Community (*2018), you can't

even adversely possess fast lands. They're just appurtenant to the property. So, these fast lands, maybe they are in this title, maybe they're not in this title. But the right to use those is appurtenant to the title of Uncle Eddie's so he can continue to access the water. The Riparian owners value - -

(Mr. Holder returns to trial table.)

THE COURT: So, I just want to understand. You believe that Uncle Eddie's can cross, let's just call that the peninsula. Okay.

MR. HOLDER: Call it the swamp, but that's fine.

THE COURT: The swamp. You're going to argue to me that Uncle Eddie's as a riparian owner up at the north and up at the south can cross the swamp to get to the water also.

MR. HOLDER: Yes. That's the law. The fast lands are appurtenant to the property of the riparian owner. I think - - I believe that's Maryland law.

THE COURT: Okay.

MR. HOLDER: And then also like I said I'm going to - - When the public especially back, let me back up here again, very deep hole back by the second railroad bridge.

THE COURT: You're now getting into testimony and you're not under oath.

MR. HOLDER: You're right.

THE COURT: Okay. So.

MR. HOLDER: I know you have a hard break at 12 and I don't think I'm going to get done.

THE COURT: You're not going to get done?

MR. HOLDER: I don't think I can squeeze all this in. I mean I have, I have just a considerable amount of law here.

THE COURT: Of law? Okay, that goes to this issue of water law?

MR. HOLDER: Well, I think maybe this is something you can look at because - -

THE COURT: Probably not.

MR. HOLDER: Well, I have the legislative intent behind two house bills.

THE COURT: Okay.

MR. HOLDER: One at Potomac River, wading in the Potomac River. They define recreationing. And the thing you'll notice in these house bills - - Let me show you - -

THE COURT: Okay. It's sounds like you got a lot. Sounds like you got a lot.

MR. HOLDER: I do. I do.

THE COURT: I do. Let's take a break now then, okay.

MR. HOLDER: Okay.

THE COURT: We'll be at 1:30 back here. Mr. Holder,

during the break, obviously get yourself something to eat. But you want to be sure that your papers are organized in a way that you can start getting things in to evidence that you believe the Court should look at. Okay. Shall we do that?

MR. HOLDER: Yes, sir. All right there. Just these right here coming in.

THE COURT: Okay, alright. I don't know if you have time, you may want to discuss with Mr. Prawde if there's any objection to whatever you're going to be bringing in, okay. What you're going to be asking to bring in. Okay. Makes things go faster.

MR. HOLDER: Okay. Yep.

THE COURT: We'll be adjourned until 1:30.

(Whereupon at 11:59 a.m., Court was in luncheon recess and resumed at 1:31 p.m. and the following occurred in open court:)

THE COURT: Okay, we're back on the record for Estes versus Holder, this is C-21-CV-2430. I did not plan the fire drill right at noon. And I'll tell you I was walking out the door and I hit the doorknob and it went off right then. I thought I did it. Alright. We were discussing Maryland Water Law with Mr. Holder. Would you like to proceed sir?

MR. HOLDER: Uh, yes, please.

THE COURT: Go ahead.

MR. HOLDER: I have - - Where's the clerk? That's you. Can you please mark this as Defendant's exhibit 1?

(Defendant Justin Holder exhibit 1 was marked for identification.)

THE COURT: Why don't you tell me what that is before you hand it to me?

MR. HOLDER: This is House Bill 767.

THE COURT: Okay.

MR. HOLDER: It's a - - I'm sorry. This is actually House Bill Chapter 427 1986.

THE COURT: Okay, slow down. House Bill what?

MR. HOLDER: It's Chapter 427 of the Acts of 1986. This is House Bill number 211.

THE COURT: Okay.

MR. HOLDER: And it's an act for recreational use of, they crossed out the state waters and they just say Potomac River.

THE COURT: Okay.

MR. HOLDER: Generally and there's a lot of drownings. Have people accessing the Great Falls and it shows legislatures intent of recreational use of the Potomac River meaning wading.

THE COURT: Okay. Is there any objection to the

entry of Defendant's exhibit number 1 as he's presenting it in context of the argument we're having with respect to water law?

MS. PRAWDE: No objection to it other than I think it's specifically related to the Potomac River and it wouldn't be applicable here.

THE COURT: Which you'll be able to argue to me at the time. Ms. Peeples, any objection?

MS. PEEPLES: No objection, Your Honor.

THE COURT: Very well. It will be admitted. Exhibit number, Defendant Justin Holder exhibit number 1. I just want to write down what it is real quick, okay.

(Defendant Justin Holder exhibit 1 was admitted into evidence.)

MR. HOLDER: Okay.

THE COURT: Okay. So, this is 1986 and you want me to look at it for legislative intent, is that right?

MR. HOLDER: Yes, Your Honor.

THE COURT: Okay.

MR. HOLDER: And this is exhibit number 2 and it is a certified copy from Annette Haldeman, Manager of References, Library, Library Information Services, also Office of Policy Analysis. So, this is what the legislature, the documents the Legislature would have

used and decided what they wrote in it.

(Defendant Justin Holder exhibit 2 was marked for identification.)

THE COURT: With respect to - -

MR. HOLDER: With respect to (unintelligible) exhibit 1, yes, sir.

THE COURT: Okay. Is there any objection to Defendant's number 2?

MS. PRAWDE: No objection.

THE COURT: Any objection, Ms. Peeples?

MS. PEEPLE: No objection.

THE COURT: Okay. Okay, so Defendant's 2 is Legislative Records concerning the 1986 Act. Is that correct?

MR. HOLDER: That is correct.

(Defendant Justin Holder's exhibit 2 was admitted into evidence.)

MR. HOLDER: Your Honor, exhibit 3 is a 2013 Chapter 140 Act and it's House Bill 797.

(Defendant Justin Holder exhibit 3 was marked for identification.)

THE COURT: Slow down for me. I need to put this one. It was upside down.

MR. HOLDER: And those copies are a little darker, they were hard to read.

THE COURT: Okay. So, Defendant's exhibit 3 is marked and what are you alleging it is?

MR. HOLDER: It's a certified copy from the Maryland State Archives of the General Assembly laws 2013 Chapter 140 and it is the House Bill 797.

THE COURT: What year?

MR. HOLDER: 2013.

THE COURT: Okay, go ahead.

MR. HOLDER: And it was Act for the purpose of the Department of Transportation local governments. Anytime you have a construction project near a waterway they need to give people access to the waterway. They need to provide for the access to the waterway for fishing, canoeing, kayaking or other non-motorized water dependent recreational activity. And thought the non-motorized part was because you told me I couldn't drive a motorboat down the creek and you kinda (unintelligible) can't do it so.

THE COURT: Say that again.

MR. HOLDER: You told me at the other hearing I couldn't drive, you weren't going to authorize when you

drive a motorboat down the creek.

THE COURT: Okay.

MR. HOLDER: And is said instead of non-motorized I said oh, maybe he knows something (unintelligible).

THE COURT: Is there any objection to Defendant's 3?

MS. PRAWDE: No objection.

THE COURT: Any objection, Ms. Peeples?

MS. PEEPLES: No objection, sir.

THE COURT: Number 3 will be admitted. Before you go to number 4 - - You can mark number 4. I want to ask you about number 3.

(Defendant Justin Holder exhibit 3 was admitted into evidence.)

MR. HOLDER: Yes, Your Honor.

THE COURT: So, this number 3 was a 2013 House Bill concerning transportation projects and water access during transportation projects. Is that a fair statement?

MR. HOLDER: That's a fair statement turned into local government regulation that actually mandates that they review access to the waterways, parking around bridges and things like that to access to open waterways of the State.

THE COURT: When things are under construction?

MR. HOLDER: When things are under construction and I believe it also asked the DNR to maintain a list of all the access points and they're supposed to be adding to them every year.

THE COURT: Just while under construction or post-construction also?

MR. HOLDER: Post construction.

THE COURT: Okay.

MR. HOLDER: Water barrels. The DNR does maintain a file online of water access points as well.

THE COURT: Okay, now we're going to be looking at what's been marked as Defendant's exhibit number 4?

(Defendant Justin Holder exhibit 4 was marked for identification.)

MR. HOLDER: Yes, and 1, 2 and 3 are admitted, Your Honor?

THE COURT: They are.

(Defendant Justin Holder exhibits 1, 2 and 3 were admitted into evidence.)

MR. HOLDER: And this is the legislative intent behind House Bill 797, certified public record.

THE COURT: Is there any objection to number 4?

MS. PRAWDE: No objection.

THE COURT: Ms. Peeples?

MS. PEEPLES: No objection.

MR. HOLDER: This is Defendant's exhibit number 5, Your Honor. It is a certified record for the Town of Keedysville crossing the Spring branch north of Mr. Estes property, US Army Corp of Engineers permit under the 1899 Courts and Authorities Act as being navigable waters of the United States.

(Defendant Justin Holder exhibit 5 was marked for identification.)

THE COURT: Okay. Any objection to Defendant's number 5?

MS. PRAWDE: No objection.

MS. PEEPLES: No objection, Your Honor.

THE COURT: Hang on. Okay, Mr. Holder.

MR. HOLDER: Your Honor, I move to admit number 5.

THE COURT: Number 5 is admitted if it wasn't already, as is number 4.

(Defendant Justin Holder exhibits 4 and 5 were admitted into evidence.)

MR. HOLDER: Number 6 is the certified record from the Town of Keedysville minutes from the July 6, 2022 mayor and council. The pertinent part is at the bottom

of the first page of the minutes where John Burtner spoke to the council. John Burtner is Mr. Estes neighbor to the north of his property. He was very concerned about the water levels in the creek. It's only gone dry once in 46 years and I do have Mr. Burtner here today to testify about it as well.

(Defendant Justin Holder exhibit 6 was marked for identification.)

THE COURT: Okay, show it to Ms. Prawde. Have you seen it?

MS. PRAWDE: I saw it, Your Honor. I do have objection to it. I think this is getting to testimony. I think right now we're dealing with legal arguments.

THE COURT: Yes.

MS. PRAWDE: And I think minutes about what another citizen said about property is not getting into legal argument.

THE COURT: I agree. Why don't we hold it until you have testimony concerning that issue and if you don't have testimony I'll reconsider admission later. Okay.

MR. HOLDER: That sounds good.

THE COURT: But it's been marked, correct?

MR. HOLDER: It has been marked as number 6, yes, Your Honor. I'll probably keep these in my legal

arguments. Your Honor, this is a certified copy of the deed from Jacob Hess to Christian Hess in 1770 (unintelligible) purchase all the lands he's reserving, land that was Mr. Estes land he's reserved by himself and his heirs and assigns forever.

(Defendant Justin Holder exhibit 7 was marked for identification.)

THE COURT: From whom to whom?

MR. HOLDER: Jacob Hess to his son Christian Hess.

THE COURT: Okay.

MR. HOLDER: That accept part of parcel said everything of water course of Little Antietam Creek and the draft of the water from the (unintelligible) spring and flow through the land, um, he reserves to his heirs and right there is the pertinent part. This deed is actually very well - -

THE COURT: Easier to read.

MR. HOLDER: It is.

THE COURT: Thank ones that you and I have seen in the past.

MR. HOLDER: Yes, and - -

THE COURT: So, you believe that this shows a reservation of water rights?

MR. HOLDER: It does and it also subjects the lands

of Gordon's purchase. And if you read the Hutzell deed it says from the lands of Gordon.

THE COURT: You're going to have to put stuff into evidence. I'm not going to just go hunting.

MR. HOLDER: I got you. Okay. Any objection to Defendant's 7?

MS. PRAWDE: Your Honor, we object that that's really dealing with the land boundary issue and not a water issue. It doesn't really get to the legal argument that they need here.

MR. HOLDER: I would argue it's appurtenant rights to the property.

THE COURT: I think this is more of a factual issue that this can come in during your testimony. Okay. So, I'm going to hold onto Defendant's 7.

MR. HOLDER: I'll wait until I get to testify and bring the rest in I think. I wasn't sure.

THE COURT: Yes, what I'm talking about right now at this stage of the proceedings is what you've shown me so far through exhibits 1-5 and this is this idea of well, what is the law of the State of Maryland with respect to water in a creek of this size as that creek traverses private property.

MR. HOLDER: Okay.

THE COURT: So, the factual issues of whether there

was rights reserved in 1770 I think are for later in the proceedings, okay.

MR. HOLDER: Alright. I'm just going to move to my legal arguments.

THE COURT: Okay, go ahead.

MR. HOLDER: Okay, so, um, the Maryland Environmental Code Annotated 5-101 and DNR Code definitions at 8-101 both read the same.

THE COURT: Okay. Slow down. Maryland Environment 5 - - Read those numbers to me.

MR. HOLDER: 5-101.

THE COURT: 5-101. And?

MR. HOLDER: DNR is going to be 8-101.

THE COURT: Okay. Go ahead.

MR. HOLDER: So, they're going to define waters of the state and it includes 1, both surface and underground waters within the boundaries of the states subject to its jurisdiction. That portion of the Atlantic Ocean within the boundaries of the State the Chesapeake Bay and its tributaries. Number 4, all ponds, lakes, rivers, streams, public ditches, tax ditches and public draining systems within the State other than those designated in used to collect conveyor disposes sanitary sewer. And 5, the flood plain of free flowing waters determined by the Department on the basis of the 100 year flood frequency.

So, we're talking about waters of the State in terms of legislature that's how they define waters of the State.

And then when we move on to the Criminal Code - -

THE COURT: Hang on. Slow down.

MR. HOLDER: Okay.

THE COURT: Okay.

MR. HOLDER: So, then we look to legislature again. We look at the Criminal code.

THE COURT: Okay.

MR. HOLDER: Maryland Criminal Law Code 6-402, that's posted trespassing. And it says a person may not trespass on property that's conspicuously posted. And you go down to number 2, paint marks, and number ii that are made or trees are posted or located at each road entrance to the property and adjacent to public roadways - - She's my witness so.

THE COURT: Ma'am, I'm going to have you just sit outside for a moment okay. I'll get to you as soon as I can.

UNIDENTIFIED PERSON: Thank you.

THE COURT: And maybe once we finish the legal argument we need to have a discussion as to which witnesses we're really getting into today by 4:30 If we're not getting to her until late I don't want to keep people just sitting out there, okay. We will have that

discussion.

MR. HOLDER: Agreed.

THE COURT: Criminal Law 6402 talks about what trespass is and is not?

MR. HOLDER: Yes, well it says where you can post your signs. I mean I'm interpreting that this is where you can post signs.

THE COURT: Okay.

MR. HOLDER: Adjacent to public roadways, public waterways, and other land adjoining the property. So, I mean at some point the legistlature is say hey you can't go post the creek but you can post along it so people can't come up off the creek onto your property. And it just sort of follows along that with, like I said, the *Annapolis Roads vs. Lindsay* case, in 2012, that affirms the *Bowie Court vs. Western Maryland Railroad* and *Bowie* affirms *Kennedy versus Brown*. In the *Bowie Court* they're talking about *Kennedy versus Brown*.

THE COURT: Do you have citations for those off hand?

MR. HOLDER: I do if - - They're actually I really spelled it out in my Motion to Alter Amend Judgment.

THE COURT: Okay.

MR. HOLDER: So, I'll just incorporate that in my argument. I picked out the pertinent parts - -

THE COURT: Let me give you a piece of advice. And

I'm not going to hold it to you today. Just a piece of practical advice. When you're making an argument to a judge don't tell the judge, hey judge, go back and look in the file for what I said three months ago.

MR. HOLDER: Okay.

THE COURT: Okay. I'm not upset with you. I'm giving you practical advice. You have other cases in this courthouse okay. When you are standing in front of a judge arguing and saying I want you to look at this case, this case and this case, it's best to have the citations ready. Okay. That's it. But I'm writing myself a note look at Motion to Alter or Amend because that's where Mr. Holder spelled it out. I will look at your Motion to Alter Amend. It's just you can make it easier - -

MR. HOLDER: I appreciate that.

THE COURT: - - on the judge you're in front of when you actually have the cases. Go ahead. I'm listening. So, you want me to look at Criminal Law 6-402.

MR. HOLDER: Yes.

THE COURT: In conjunction with your Motion to Alter or Amend to discuss the *Annapolis Road Bowie Kennedy* (unintelligible) we'll call them. Okay. Why?

MR. HOLDER: Because that - - Because *Annapolis Roads* and *Bowie* are construing Real Property Article 2-201,

that says, when you call to a public road you call to the center of the public road and it's, it's, it's really Mrs. Prawde's argument that she made, the *ad filum medium publicum*. That's where it comes from. That it's to the center of the thread where *ad medium filum* to the center. And the reason for these rules is because these public roads, I mean whether you own Maryland 34 in fee or the State owns it as a right of way it doesn't matter. It's public doctrine of trust. You can just go there. It's just, it's just you can be there as a member of the public. You can't exclude people that are there. And I just think that's pretty much the premise of this whole situation.

THE COURT: But - - Okay. I don't want to jump in on you. You understand that nobody in this courtroom is saying the public cannot use the water? The only issue is can the public walk on the bottom? That's the issue.

MR. HOLDER: Okay. And you have a right-of-way to a road and if you get a flat tire and you pull off the road you can change it, you're not trespassing.

THE COURT: Yes, but you're already, you're already physically on the pavement.

MR. HOLDER: What if it's a gravel road. What if it a little washed out?

THE COURT: You're already physically on the gravel.

You're already physically on the grass.

MR. HOLDER: So, what if you hit a pothole?

THE COURT: The issue in this Court - - I just want to - - I don't want to - - And, look, we're in the middle of your argument so I don't want to jump in too much I want you to understand because I made this issue clear in the original order I think from September on the Motion for Summary Judgment and I made it clear again in my orders the other day where in your objection you argue I've changed sort of the course of this litigation. I pulled the rug out from under you. I clarified and made this - - No, I think I was very clear in September. I was very clear two days ago, one day ago. Nobody is saying that the public cannot raft on top of the water, kayak on top of the water. Nobody is asking me to exclude the public including the Holder family from utilizing the water on top of it. What is being asked of me is to exclude you from walking on it.

MR. HOLDER: Well, that's kind of my point is if you can get on top of it you can walk on it so.

THE COURT: No. I wholly disagree with you.

MR. HOLDER: Okay.

THE COURT: I am concerned that you - - I'm concerned that you're going to go through two days of litigation and you're just going to say, well judge, of course you

can walk on it if you can raft on it. I think the case law that both attorneys have provided me when read as a whole suggest that that is not correct. And so, if you want to, you want me to look at the criminal article, *Annapolis*, *Bowie*, *Kennedy* and Real Property 2-201, for the proposition of what?

MR. HOLDER: *Ad filum medium aquae sub publicum*.

THE COURT: The center of the - - What does that mean?

MR. HOLDER: To the center of the threads subject t the rights of the public.

THE COURT: But the center of the thread I've already decided haven't I?

MR. HOLDER: Subject to the - -

THE COURT: The center of the thread was the property line issue. You wanted me to put the property line down the center of the thread of Antietam Creek and I said no.

MR. HOLDER: I - - Yes.

THE COURT: I said, nope, it goes out on the land. So that Latin phrase to me I am concerned it doesn't have any bearing anymore because I already decided the property line.

MR. HOLDER: Well, *sub publicum* is what we're arguing the rights that are at issue appurtenant to the property, the public easements and gross and what rights the public

actually have under the doctrine of public trust. I think it's poor public policy to say if you flip your raft and you touch the bottom you're going to get locked up for 90 days and you're going to have to drown or you can't swim to the edge of a creek that - -

THE COURT: I'm not here to determine public policy. I hear what you're saying. I asked Mr. Estes that same exact question, I don't know, eight months ago, we were in a hearing in a different courtroom down the hallway.

MR. HOLDER: You did.

THE COURT: And I said Mr. Estes is it really is your position, help me understand, I said Mr. Estes are you really saying I can kayak on that water but if I fall out and I step on the bottom to get back in my kayak that's not permissible. And his argument was, yeah, you're not, you can't do that. That's his whole point in this litigation.

MR. HOLDER: Well, and he has to show that his, what he wants to reserve and enjoin us from is irreputable to him and it's not, it's some great disadvantage to the people that can use the water to riparian water to kayak and if they hit a little bump and hit a stone next thing you know you're getting charged for criminal trespass and ninety days or MDE says, hey, go up here and take a picture of this bridge for me, you throw on a set of

waders and walk up there and do it.

THE COURT: I think his - - I think his argument for irreputable harm is that people who own property have a right to enjoy their property without being trespassed on. It's not that criminal charges would occur. My guess is you probably agree with that too. Mr. Estes doesn't have the right to just walk in and sit on the back porch of 28 Antietam Street if that's the correct address. He doesn't have that right. And if you raise an issue with it you're allowed to, you may be able to get an injunction because you have a right of property ownership.

So, I'm trying to understand this whole trial is about what is the right to property ownership that Mr. Estes enjoys or what doesn't he enjoy. Is it in the bundle of sticks of is it not in the bundle of sticks?

MR. HOLDER: Right. Right.

THE COURT: Exactly. But nobody is saying that I'm going to exclude people, anybody, including you, from using the water, rafting, kayaking, canoeing, those sorts of things where your body can come in contact with the water.

MR. HOLDER: Potentially the other recreational uses such as wading your body can come in contact with the water.

THE COURT: We're going to discuss whether wading is one of those uses that's allowed.

MR. HOLDER: Fishing and - -

THE COURT: Recognizing that wading means you're touching the bottom of the land. Right? I mean that's the issue.

MR. HOLDER: Not necessarily. I mean, you know the diffence between land and water, I mean you have very muddy waters.

THE COURT: No, there is ono difference. There is a difference. It is called the subcutaneous layer under the water it's from one of the cases. It's not subcutaneous. *Subaqueous*. I don't even know how to spell it but it's in one of the cases. Does the party have the right to the ownership and the use of the sub aquas land underneath the water? I'm not going to get in to - -

MR. HOLDER: There's one molecule of water beneath my shoe and therefore I'm on the water.

THE COURT: There's one - - I'm not going to get into that.

MR. HOLDER: I can understand that.

THE COURT: That's impossible.

MR. HOLDER: It's an impossible argument to make, I agree. I agree.

THE COURT: Okay. So, you want me to look at Criminal 6-402 *Annapolis Bowie Kennedy*?

MR. HOLDER: Yeah.

THE COURT: Real Property 2-201 - -

MR. HOLDER: And just - -

THE COURT: - - for the idea of what is or what is not trespass, what is or what is not.

MR. HOLDER: Yeah, and I can just copy and paste the section in my MTA called the Common Law Authority if that's the actual section. If I just copy and paste that into a Bench Trial Memo I can just send it to you.

THE COURT: If you wish to have a Bench Trial Memo I've given Ms. Prawde has had that opportunity, Ms. Peeples has asked for that opportunity. I'm going to give it to her. I'll give it to you too.

MR. HOLDER: I'll do that for the Court's convenience.

THE COURT: Okay, that would be helpful.

MR. HOLDER: Yes, yes, Your Honor. Thank you.

THE COURT: What else do you want to tell me?

MR. HOLDER: That would be all for legal argument.

THE COURT: Okay.

MR. HOLDER: May I sit down?

THE COURT: Yes. You don't have to ask permission. I'll tell you if you can't. Okay. Are we ready for

witnesses then?

MS. PRAWDE: Your Honor, may I have an opportunity to briefly respond to the legal argument?

THE COURT: Sure.

MS. PRAWDE: Um, I don't know if this is going to clarify things or not but just to be clear in Plaintiff's Second Amended Complaint what he is seeking here is an injunction as - -

THE COURT: Let me get the complaint because if I'm wrong is to what he's claiming we better, I better know that right now. Okay. Where are you?

MS. PRAWDE: I don't, I wrote it down. I don't have it in front of me. It's under the Count 5.

THE COURT: Okay. Count 5.

MS. PRAWDE: Under the relief that is being sought.

THE COURT: He asked for judgment quieting title.

MS. PRAWDE: Correct.

THE COURT: Confirming the location of the line. I think I've done that.

MS. PRAWDE: Correct. And then the other relief just being sought is to enjoin specifically the defendants from further trespass. So - -

THE COURT: Right.

MS. PRAWDE: - - we're not seeking here to enjoin members of the public from being on the property which

would include walking along the creek bed specifically the injunction would just be limited to the Holders here. And that injunction is in part because they claimed or at least Mr. Holder has made an assertion as to a challenge to quiet title claim and as to their particular history of being the ones that Mr. Estes was aware of not members of the public but the Holders or Mr. Holder of being on the property. So, the injunction is limited to that so, you know, to the extent whether members of the public have a right to walk along the creek bed I don't think is the issue here. I think it's specifically to whether the Holders have that right, which again, I don't know if there's a distinction mark but - -

THE COURT: Okay, but hang on. I know. I was never thinking about enjoining the entire public because I can't because they're not here.

MS. PRAWDE: Right.

THE COURT: Okay. If I was to enjoin Mr. Holder and his family I am concerned that I need to be specific as to what that injunction is. If I simply say Mr. Holder is enjoined from trespassing but I say nothing as to what I define as trespass he may take it as I'm also a member of the public. And therefore, I get to kayak down that creek. I don't know if Mr. Estes is saying - - I had always thought he was not precluding Mr. Holder from

kayaking.

MS. PRAWDE: Correct.

THE COURT: That comes from a conversation I think me and Mr. Estes and Mr. Holder had down in courtroom number 3, six to eight months ago, and there weren't any attorneys there. It was a hearing. If my memory is correct.

MR. HOLDER: March 11th, Your Honor.

THE COURT: There you go. Or Mr. Holder could take a no trespass injunction to mean well, as a member of the public I'm allowed to walk on the bottom of the creek. And he walks down and he's got his fishing waders on and he's got a (unintelligible) and he sits there and he fishes fly. If I don't have the clarity - - If I were to set an injunction, if I don't provide the person to whom I'm setting an injunction the clarity of what I mean then I'm inviting trouble.

MS. PRAWDE: Understood.

THE COURT: Because he - - He could potentially - - I'm not saying he would. He could go out fly fishing. Mr. Holder could go out fly fishing. Mr. Estes could say, now you violated the injunction I'm calling the police and now I got law enforcement down there. They're both holding up a piece of paper from Wilkinson and the State Trooper says I don't know what this means. Don't I

have to provide that clarity?

MS. PRAWDE: Yes.

THE COURT: Okay.

MS. PRAWDE: So, we agree with there would need to be a clarification about whether that does include a right for the Holders specifically to be walking on the creek bed. I guess just to the extent if there's any distinction. I mean we're seeking that injunction for the reasons of there has been this history of them in particular being on there.

THE COURT: So, that even if I found that the State law of Maryland was that the public is allowed to walk on that creek bottom because it's navigable you still want me to put an injunction against Justin Holder and his family because they've trespassed before quote unquote I'll let the record know I am quote unquote the word "trespass"?

MS. PRAWDE: I think whether the public has a right to it would just be outside of what we're seeking here with an injunction specifically out to the Holders.

THE COURT: But how do I enjoin someone if my determination is that the public has the right to walk on the creek bottom why is it them appropriate for me to enjoin Mr. Holder from doing what the public is already allowed to do?

MS. PRAWDE: I guess why that would even then be an issue about whether the public could or could not walk on the bottom.

THE COURT: I don't understand what you mean. How can I enjoin - - How can I enjoin somebody from doing something the public is allowed to do? This isn't criminal court. I'm not - -

MS. PRAWDE: I understand.

THE COURT: You know, I'm not taking the driver's license away from somebody because they violated the motor vehicle law too many times.

MS. PRAWDE: Yeah.

THE COURT: Okay. In that situation I can enjoin somebody from doing something the rest of the public can do. But this is - - If I were to decide the public is allowed to walk on the bottom of the creek how is it that I'm allowed to enjoin Mr. Holder from an activity that therefore would not have been a trespass to begin with? I mean we're here because - - The big allegation is that he trespassed in the creek and up on the land, maybe, maybe he cut down some trees, I don't know. But if you're asking me to enjoin him from the trespass in the creek but what if it wasn't ever a trespass because I find that the public is allowed to be in the creek?

MS. PRAWDE: Understood.

THE COURT: Okay.

MS. PRAWDE: Okay, I just wanted to make sure we were clear about what our injunction is specifically as to them but.

THE COURT: But what you were saying is I don't really have to worry about navigability I really don't have to worry about public access because what you're just asking me to is enjoin them from being on the land at all.

MS. PRAWDE: The land and then the creek bed.

THE COURT: Because they've trespassed before or he has trespassed before, allegedly.

MS. PRAWDE: That was - - Yes.

THE COURT: Okay, what else?

MS. PRAWDE: And just as to something that Mr. Holder had mentioned about a easement as to the property. We would assert that the Woodlands exception would apply here, which essentially saying that if a tenant if someone had permission to use the land - - I'm sorry. If property is unenclosed if it's unimproved or if it's in a general state of nature the landowner does not need to object to others passing through the property and in that circumstance a prescriptive easement cannot be established. So, here the Woodland exception would be applicable to this unenclosed general state of nature

surrounding the creek as well as the land around the creek.

In terms of the house bills that Mr. Estes, I'm sorry, that Mr. Holder had introduced, and I think it's Holder exhibits 1 through 5, those are dealing with other sorts of waterways or dealing with specific circumstances related to what can or cannot be done when a bridge is being built or when something else is under construction. I think, Your Honor had made mention of, you know, what we're really looking at here is, um, how similar bodies of water such as a creek that traverses someone's private property is dealt with. So, any sort of argument about the Chesapeake Bay or large lakes or anything like that and how recreation perhaps is defined in those would not be applicable.

As to criminal, Criminal Article 6-402, which Mr. Holder had cited, which talks about trespass on posted property, certainly that's one aspect of trespass but it is not the limited definition of trespass. I mean if you take a look at 6-403 the very next subsection it says a person may not enter or cross over private property or aboard the boat or other marine vessel of another after having been notified not to do so unless entering or crossing in good faith. Claim of right or ownership. So, my point is just that there's other aspects of

trespass such as crossing onto someone's private property.

THE COURT: Okay.

MS. PRAWDE: And, again, as to the mention of the center of the public or road that is not applicable here. We're not talking about public roads. We're talking specifically about a waterway and we've already included in the memo and in argument today essentially what the case law is to that as to a non-navigable creek or river as opposed to a public highway or public road. So, I don't think that that article would be applicable here.

THE COURT: Okay.

MS. PRAWDE: That is our response. Thank you, Your Honor.

THE COURT: Thank you. Ms. Peeples, you had stood up.

MS. PEEPLES: Your Honor, I think you already said what I was going to say is that in just clarity of the record I don't think that in any legal world can a court make a determination that if the public has certain rights to something that you then can enjoying a specific person from doing what the public rights have. I haven't looked at the case law yet but I'm certain that there's something about it. I just wanted to make that clear for the record.

THE COURT: I hear you okay. Alright, anything else

Mr. Holder on way of legal argument concerning the water law? If not it's okay. We're going to go to testimony.

MR. HOLDER: The only thing in her Bench Trial Memo I noted that her, she cited to some dicta out of a case.

THE COURT: It was her old memo.

MR. HOLDER: No, no.

THE COURT: Her new memo might fix it. The new one does?

MR. HOLDER: The new one cites to what she starts defining navigability.

THE COURT: Don't worry about it. I understand your concern. I remember your objection to the first one. So, is it similar?

MR. HOLDER: This one is different. The case she cites is like you said it's a 48 foot boat in the middle of a bay and when they're defining navigability it's under the Maritime Law of, you now how like if you're on a sailing vessel and hey turn the jib judge, like who's navigating the vessel. That was the argument, right.

THE COURT: Okay.

MR. HOLDER: Yeah.

THE COURT: I'll review that memo with scrutiny because I understand the concern about holdings versus dicta, I get it.

MR. HOLDER: Yes, thank you.

THE COURT: Alright. Are we ready for a witness?

MS. PRAWDE: Yes, Your Honor. Did we want to discuss the witnesses?

THE COURT: Oh, yea, let's discuss the timing here. Thank you for reminding me. We're at 10 minutes after 2. Who will your first witness be?

MS. PRAWDE: Uh, Your Honor, we just intend to call Mr. Estes.

THE COURT: Okay.

MS. PRAWDE: I don't really want to give a time limit. I can't imagine - -

THE COURT: No, no, no.

MS. PRAWDE: But I don't think it's going to be excessively long. Um, and then - -

THE COURT: But it's also not going to be 10 minutes.

MS. PRAWDE: Correct.

THE COURT: Right.

MS. PRAWDE: Correct.

THE COURT: After Mr. Estes would you expect to have another witness?

MS. PRAWDE: Just Ms. Estes who I anticipate to be much shorter and that would be it.

THE COURT: Okay. That's fine. After that would you expect any others?

MS. PRAWDE: Not at this time, no.

THE COURT: Ms. Peeples, would you expect any witnesses?

MS. PEEPLES: Your Honor, I'm not planning on calling any witnesses. Again, I'm here pretty much for the purpose of preserving the record and making proper objections in due time.

THE COURT: Understood.

MS. PEEPLES: That's all my purpose is.

THE COURT: Okay, Mr. Holder, who would be your first witness?

MR. HOLDER: I have John Burtner the northern neighbor to Mr. Estes.

THE COURT: Okay. How many other witnesses are sitting out in the hall right now that you think you had asked to be here today?

MR. HOLDER: I did ask Ms. Morral for just one paragraph and one email to authenticate.

THE COURT: Uh huh.

MR. HOLDER: I told her I was going to get her in first and get her done really quick.

THE COURT: Okay, so you might go Morral then the other guy?

MR. HOLDER: I'm thinking just because she's only going to be really short.

THE COURT: Who else is out in that hall do you

think?

MR. HOLDER: Uh, Ms. Donna Levy who is a fact witness about, you know, just communal use of the creek. And then I have George Nagle coming for expert testimony.

THE COURT: What time do you expect Mr. Nagle?

MR. HOLDER: I told him to come at 3:00 but I think we're not going to get to him by 3:00.

THE COURT: I don't think we're going to get to him. My concern is just leaving people out in the hall all day and then make them come back tomorrow.

MR. HOLDER: So, I know.

THE COURT: So, if we've got Mr. Estes, Ms. Estes, Mrs. Estes, Morral, and then the other guy.

MR. HOLDER: Mr. Burtner.

THE COURT: Okay.

DEPUTY: There are three witnesses here on your behalf and one in the hallway for yours. Only one male, two females.

MR. HOLDER: That's correct.

THE COURT: Okay. Well, I'll leave it up to you Mr. Holder. If you want to excuse any of your witnesses for the day you may because I'm concerned we're going to go, we're going to go to 4:30, we're going to take a break at some point. So, we probably have two hours, a little bit more than two hours of testimony time. We might take

more than one break. So, I think we have two hours of testimony time. We've got Mr. Estes and Mrs. Estes plus the cross-examination.

MR. HOLDER: I think I can get my fact witnesses in. I'm going to have Mr. Nagle show up tomorrow.

THE COURT: Why don't you do that.

MR. HOLDER: Okay.

THE COURT: Okay. Do you want to make - - Do you want to send a text right now?

MR. HOLDER: I will send him a text.

THE COURT: Okay.

MS. PRAWDE: Your Honor, we would like to be heard about Mr. Nagle's, I mean his expert opinion that he had given prior to this dealt specifically with the boundary issue. It had nothing to do with this very narrow issue.

THE COURT: Understood. I mean I'll hear that when Mr. Nagle is called or we can discuss this at the end of today.

MS. PRAWDE: Okay, I just didn't want to hold him up if there was going to be a ruling where he should be excluded and would not need to appear tomorrow but.

THE COURT: Understood.

MS. PRAWDE: Thank you.

THE COURT: You can go ahead and send that text while we're working here.

MR. HOLDER: Okay.

THE COURT: Ms. Prawde, are you ready for your first witness?

MS. PRAWDE: Yes, Your Honor. I call Benjamin Estes.

THE COURT: We're good with everybody in the hall. They can stay out there.

TESTIMONY OF BENJAMIN ESTES

Benjamin Estes, having been duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. PRAWDE:

Q. Mr. Estes, can you state your full name and your home address for the record please?

A. Benjamin Niu Estes, 22 Mt. Hebron Road, Keedysville, Maryland 21756.

Q. Okay. And can you briefly tell the Court a little bit about your educational background?

A. Sure. Although I don't like to talk about it much. I graduated from college. I graduated from Harvard in 1993. Then I went to law school. Started at Georgetown Law. Went there for, I think, it was two years. Finished up and got my law degree in the year 2000 from University of Maryland School of Law. And then I went and attended pharmacy school at the University of Maryland and completed in 2010 I think, don't hold me to

that.

Q. And have you previously been a practicing lawyer?

A. Yes, yes I have.

Q. Okay. And where did you work when you were a practicing lawyer?

A. I worked for myself and then for the Public Defender's Office here in Washington County. For the record, I still am a practicing attorney.

Q. And where are you currently employed?

A. I work for John Hopkins University.

Q. What is your position there?

A. I'm a pharmacist for John Hopkins as well as I'm really - - I don't work the bench anymore. I'm more of an administrator.

Q. And do discuss your property how long have you lived at 22 Mt. Hebron Road?

A. Twelve years.

Q. And when was it that you purchased your property?

A. 2010.

Q. And did you purchase it in different parcels or all at once?

A. I did. I think it's important to clarify for the Court that in total I own three parcels of land in Keedysville. We purchased the first parcel where my house is on approximately six acres. This piece of

property is not included in that first purchase. But we did agree at closing to rent this land from the previous owner Maxwell Hope and to maintain the property with the intent to purchase it after a certain amount of time, which we did after I think it was two to three years I can't remember exactly the date that we purchased this property. I think it was in 2013. But also, on a separate piece of property which adjoins the property in question but in area that does not abut the Holder's property, Uncle Eddie's property or the Little Antietam Creek in that area.

Q. And who do you reside with at 22 Mt. Hebron?

A. My wife Lisa Estes, my daughter, Piper Estes, and my other daughter Briley Estes and my mother-in-law, Genevieve Slaymaker.

Q. And about how many acres is your property?

A. This piece of land is approximately eight to nine acres. The other parcels are approximately six and approximately twelve.

Q. And are there any creeks out through your property?

A. Yes. The Little Antietam Creek runs from my property as well what I like to call Spring Creek and there's an additional creek, which isn't really Spring Creek, we can call it a creek that runs up to the well

head the Keedysville Spring Keedysville Well whatever you want to call it. There's a little stream that goes up in there too. I'd be happy to show the judge and the court.

THE COURT: Why don't you just describe to me where, where it is.

A. Sure. On the northside of the map there is where my house is located. Okay. Would it be easier if I showed you rather than describe?

THE COURT: Actually, do you mind if he goes down to show me?

MS. PRAWDE: Sure, that's fine.

THE COURT: Yes, that would be helpful.

(Mr. Estes steps down to easel in well of the court.)

MS. PRAWDE: If we can just identify this is Plaintiff's exhibit 1, which is the blow-up of plat 9186.

THE COURT: Okay, do you wish to have that admitted?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Any objection to Plaintiff's 1? Plat 9186?

MR. HOLDER: No objection, Your Honor.

THE COURT: Plaintiff's 1 will be admitted.

(Plaintiff's exhibit 1 was marked for identification and admitted into evidence.)

THE COURT: So why don't you stand on the other side

so that the Defendants can see.

A. Okay, so my house is located here.

THE COURT: Okay, referencing the proposed dwelling with the word under it Lot 2.

A. Oh, I'm sorry, that's a proposed dwelling. My house is actually right here (indicates on map).

THE COURT: Okay, to the right is your dwelling.

A. That's right.

THE COURT: Got it.

A. This section of property from this line which runs from Mt. Hebron Road south to the east I bought as a separate parcel. This is where my house is located. So, this is where I purchased the land with my house in 2010.

THE COURT: Okay.

A. The property that's in question in this litigation is located here (indicates on map).

THE COURT: So, beginning at Mt. Hebron Road where there's the proposed dwelling - -

A. That's right.

THE COURT: And then moving down to the south and slightly to the west down to the bottom of the drawing where the words to the far left say abandoned B&O Railroad.

A. That is exactly correct, yes.

THE COURT: Okay. Got it. And then the other land

that you purchased, the twelve acres, where is that?

A. That is up here. It's marked on this plat as N/F Victor J. Peeke, Liber 1206, Folio 32. I purchased this land up here from Victor Peeke.

THE COURT: Okay.

A. It runs generally to the east.

THE COURT: And that's the property to the south of the image at the bottom of the image labeled Victor Peeke.

A. Yes.

THE COURT: Okay, understood. Thank you.

A. The creek in on the property.

THE COURT: Yes.

A. The property that we're litigating here today is the Little Antietam Creek, which runs from the southerly direction from the south it runs generally north and east and it takes a turn due west. That is the Little Antietam Creek. The Spring Creek feeds into the Little Antietam Creek approximately where this says IP set in L10.

THE COURT: Yes.

A. This is what I call, and I don't know it's true name, the Spring Creek and it runs generally from an easterly direction to the west and meets the Little Antietam Creek.

THE COURT: Okay.

A. What I like to call the well head or whatever you want to call it the spring head is located here (indicates on map) and just to the south of Spring Creek and runs from east due west and meets the Spring Creek on my property that is part of this litigation.

THE COURT: Okay, so that spring head creek if we call it, is that what you called it?

A. Sure, we can call it that.

THE COURT: No, what did you just call it?

A. Spring Head Creek.

THE COURT: That's different from Spring Creek?

A. Yea, it's actually - - Yes.

THE COURT: But it connects to Spring Creek right at the conjunction right at the northern corner of the property labeled as Town of Keedysville Liber 332 Folio 50 on this exhibit, right?

A. Yes, yes, that's correct.

THE COURT: Okay. I understand.

A. Do you want me here or you want me back?

MS. PRAWDE: I will be bringing you back up but for now you can take a seat. Thank you.

THE COURT: Okay.

A. Okay. (Mr. Estes returns to witness stand.)

Q. And Mr. Estes, do you ever take any walks along

or in or near Spring Creek or Little Antietam Creek?

A. Yes, every day just about.

Q. Okay. Multiple times a day, once a day?

A. Multiple times a day, generally.

Q. And why do you, why do you tend to walk those areas?

A. I love being outside. I love being with my family outside. We also have dogs that we like to walk and need exercise so when we bought the property we bought it because those areas are secluded and are hidden away really and we enjoy our privacy, we enjoy being outside. But since I moved there, Your Honor, I have walked those areas really the entirety of my property on a daily basis. There are some areas where I don't go every single day but generally speaking at least in the area that's in question I walked there for years two to three times a day. Recently with, you know, depending upon workload once a day, sometimes if I'm sick none. But I walk there all the time. Yes, for years.

Q. And do you take these walks year round?

A. Yes.

Q. And if we could just mark these as exhibit 2. This is just a smaller version.

(Plaintiff's exhibit 2 was marked for identification.)

Q. And Mr. Estes, could you just identify for the record what this is?

A. Yeah, this is plat 9186, looks like the Land Records of Washington County.

Q. Okay, and I would move to admit Exhibit 2, which is, again, just a smaller version of what's been admitted as number 1.

THE COURT: Any objection?

MS. PEEPLES: No objection.

THE COURT: Plaintiff's 2 is admitted.

(Plaintiff's exhibit 2 is admitted into evidence.)

Q. And Mr. Estes I apologize if you've already done so but looking at Exhibit 2 can you just identify where your house is, where you currently live?

A. Sure, it's to the north of the, of the plat along or near Mt. Hebron Road. It's identified I think as, my vision is not great, but existing dwelling.

Q. Where it says number 22 existing dwelling?

A. Yes.

Q. Okay. And can you point out where Uncle Eddie's property is on Exhibit 2?

A. Sure. Would you like me up here or?

THE COURT: You can do it right there.

A. Okay. Uncle Eddie's is generally to the west of

this plat. Um, if you look at the Little Antietam Creek as it runs in a northerly direction from the abandoned B&O Railroad northward their land is to the west and north of the survey lines. It is marked on this plat.

Q. And if you take a look at where is says Forest Conservation and Retention Easement, do you see that?

A. Yes.

Q. Who owns the property above that?

THE COURT: North of that you mean?

Q. I'm sorry, yes, north of that.

THE COURT: Okay.

A. Um, there are two forest conservation and retention easement areas.

THE COURT: Which one are you asking about, Ms. Prawde, the one to the bottom of the picture or top?

MS. PRAWDE: The one towards the top.

THE COURT: Okay.

A. Towards the top. I believe that's owned by the Watkins. Debra Watkins, and I can't remember his name.

Q. And can you identify where the Holder's house is on this plat or roughly where it is if it's not shown on the plat?

A. Honestly, I don't, I've been up there one time but it's generally if you look at where the meets and bounds sort of numbers are the number lines with

directions and distances it would generally be towards the bottom of that.

Q. And as reflected on plat 9186 does your property include land on both sides of Little Antietam Creek.

A. Absolutely, yes.

Q. And does your land include property that is on both sides of Spring Creek?

A. Yes.

Q. Is there any section of Little Antietam Creek that the Holders or Uncle Eddie's would not be able to get to unless they crossed through your property?

A. Yes.

THE COURT: Say that again.

Q. Is there any section of Little Antietam Creek that the Holders would not be able to get to unless they crossed over your property?

A. Are there areas - - I'm sorry.

Q. I can reverse. I think my question is a little confusing.

A. Yeah, I don't want to say the wrong thing.

Q. Are there any areas where - -

THE COURT: Sort of depends which direction you're going because I think Eddie's borders the creek up around the bend at a minimum, I think, right?

A. Correct.

THE COURT: As you go up around this bend and, and the bend - -

A. Around L-5, yes.

THE COURT: - - and the bend, and the creek bends out to the west.

A. I believe that's where their property is, yes, yep.

THE COURT: There's - - Their property - - They have property up there. Okay.

A. Yea.

THE COURT: But you're just asking about this one on this exhibit?

MS. PRAWDE: On this exhibit.

THE COURT: Okay.

Q. Specifically looking at what has been defined by the boundary line on 9186 and 10955 as your property. Is there anywhere where the Holders abut or their property is adjacent directly to Little Antietam Creek?

A. The - - Mrs. Holder I believe owns land that abuts the creek but I don't know exactly where her land is. As the judge had mentioned around the bend and down the stream of my property or down stream of where I think it's L-4 crosses the Little Antietam Creek. But I can't, I can't quite make it out. I think Mrs. Holder owns some land down there, um, but I'm not sure who really owns

past my property. Uncle Eddie's owns some land that's not shown on this map as abutting the Little Antietam Creek no.

Q. And I want to make sure I'm clear. So, just looking at this plat and how the property boundary is defined here - -

A. Um hum.

Q. - - is there anywhere where the Holders their property directly abuts Little Antietam Creek, such that they would not need to cross over your property to get to the creek?

A. No, no.

MS. PEEPLES: Can you repeat that please?

MS. PRAWDE: I will try to.

Q. Uh, just looking at this plat and what the boundary line is that's been defined that's being litigated here. I'm not talking about any other area of Little Antietam Creek where they may own property.

A. Okay.

Q. Just specific to this.

A. Okay.

Q. Is there any property that the Holders or Uncle Eddie's own that you're aware of that directly abuts Little Antietam Creek such that they could access it without needing to cross over your property?

A. No, it would have to cross over my property to access to Little Antietam Creek as shown on this plat.

Q. And with Spring Creek is there any area of Spring Creek where the Holders property abuts it or is adjacent to it such that they could access Spring Creek without crossing over your land.

A. As shown on this.

Q. As shown on plat 9186.

A. There are some areas of Spring Creek that they that they could access but they'd have to access it through other people's property as shown on this plat.

Q. And where would that be?

A. Um, where it reads approximate location of a five foot W/L easement. You can see that there are areas, at least it appears from this plat, that where it pre-existed at that time back in 2007, it appears as though there my be some areas owned by the town of Keedysville where they could access the Spring Creek that I don't own.

Q. Okay. That you don't own?

A. That's right.

Q. Was there any part of Spring Creek that is part of your property that the Holders could access without crossing across your land?

A. No, oh no.

Q. Okay. And when you would talk about taking walks earlier on your property, does that include taking walks all along the areas of Little Antietam Creek that are shown within your property boundary on the exhibit 2?

A. Yes.

Q. And are there any parts of Little Antietam Creek that are on your property that are totally dry?

A. Yes.

Q. Can you identify where those are?

A. There are various spots. There are rocks that stick up out of the water in numerous places. There is also areas where sand or gravel has gradually built up over time and created little areas that are completely exposed from the water, certainly, yes.

THE COURT: Ms. Peeples?

MS. PEEPLES: Your Honor, I would just like to object based on land that had totally dried at which point or when. I mean it's - -

THE COURT: I think we'll have to get into that and it's subject to cross-examination if you wish.

MS. PEEPLES: Okay.

THE COURT: His answer was there are areas that are dry, areas that have rocks sticking up.

Q. Um, within the last three years have there been areas of the property that have been continuously dry

that you have observed during your walk?

A. Yes.

Q. And can you identify roughly where those are on the Little Antietam Creek?

THE COURT: I think at this point I need him at the big exhibit number 1.

MS. PRAWDE: Okay. Thank you. (Mr. Estes steps down from witness stand and approaches easel showing Plaintiff's exhibit 1 in the well of the court.)

A. And if I may just in total candor - -

THE COURT: Okay.

A. - - there are very large floods that occur occasionally.

THE COURT: I'm sure you're going to get asked about it. I got it.

A. Okay. But I do not wish to misstate anything.

Q. So, Mr. Estes, can you identify where the areas of Little Antietam Creek are that you have observed being totally dry over the last three years?

A. Sure. There's an area that generally tucked in here.

Q. And if you can just try and use any the descriptors that are nearby.

A. Sure. Where it says Zone A North 250321 near the 208.5 foot line.

Q. Anywhere else.

A. Sure, there's also an area down in this general area of L5 where it (unintelligible) approximately under your flood plain. There's an area in there. And if we're just talking about the Little Antietam Creek I believe there's another area at this marker here and near the north 025125 east 203.44 line.

Q. Okay.

A. Your Honor, sorry, in this general area.

THE COURT: Right above the word Antietam?

A. Yes. And there's also an area here where the Spring Creek feeds into the Little Antietam Creek. There's an area of dry land it's almost like a Little Peninsula that's built up. And I was just there yesterday (unintelligible).

THE COURT: Okay, go ahead. Okay. Why don't you stay down there for a minute in case we have to use it again? Go ahead Ms. Prawde.

Q. Um, and, Your Honor, that was going to be exactly what I was going to ask permission for. My next several questions are sort of walking through different areas of Little Antietam Creek. So, starting at the southernmost point of Little Antietam Creek shown on this plat, Exhibit 1, how would you describe - - So, looking at the area where it says abandoned B&O Railroad up through

where it says Zone A, Zone C, just looking at that area. How would you describe the depth of that part of the Little Antietam Creek in that area that you've observed over the last couple of years on a normal basis during your walk?

MS. PEEPLES: Objection. Objection.

THE COURT: What's the objection?

MS. PEEPLES: How would he describe the depth is overly broad as to a certain area of the creek in terms of time, space.

THE COURT: Overruled. Mr. Estes.

A. Where you see on this map, Your Honor, where it says Forest Conservation in the retention easement area.

THE COURT: Yes.

A. There's an IP found a little notation there. In this general area on my property and north for I don't know approximately about fifty feet this is all boulder strewn. I can actually walk across the creek there without getting wet. It's just about any time of the year except after some huge run that's only for maybe a day. So that's entirely boulder strewn. I think I have pictures which will show that.

THE COURT: Okay, south. So, at the southernmost point how far up? How far up would you say?

A. I would say 50 about 50 feet.

THE COURT: Okay, 50 feet.

A. Yep.

THE COURT: Okay.

A. At least. At least, Your Honor. Give or take I mean I - - But at any rate it's boulder strewn. You can walk across it without getting wet. My daughter walks across it and she's ten years old. So, at the base of that however, closer to where you see Zone C and Zone A here, there is a large pool here and I'd say that's about five feet deep. I have swum in that. But then in that general area there is a large pool. I call it the big pool is what I call it near the railroad track. There is a large pool up in this general area.

Q. And Mr. Estes where you talked about the boulders and being able to walk across them without getting wet and that 50 feet or a little bit more area is that something you've observed year round that you can do?

A. Yes.

Q. Okay. And where you talk about the pool around Zone A and Zone C that's about five foot deep approximately how many feet long would you say that is up the creek?

A. 50 to 75 feet in the general area.

Q. Okay. And have you ever seen anyone swimming or kayaking or otherwise in that five foot pool?

A. Not that I can remember. I did see some kids up in there, um, but that was a little further north.

Q. Okay. Well, I'm just talking specifically about that area. And have you observed any sort of ebb and flow of that specific area of the creek that we're talking about, any sort of movement of the water?

MS. PEEPLES: Objection.

THE COURT: What's the objection?

MS. PEEPLES: Has he observed any ebb and flow. I think ebb and flow as ranged to a title characteristic is, is more appropriate for an expert witness to testify as to what they've observed. Someone, a lay person can see a river flowing but they - -

THE COURT: Overruled. And I can sit on the beach and I can see the tides. The question is, is there tides here in the Little Antietam Creek? Have you ever seen a tide in the - - Do you know what a tide is?

A. Yes, Your Honor.

THE COURT: Have you ever seen tides in the Little Antietam Creek?

A. No, Your Honor.

THE COURT: Very well, next question.

Q. And based on the depth and terrain would you be able to swim, kayak or take a rowboat in that section of the creek. Again, we're talking about just from

abandoned B&O Railroad up through Zone A and C?

A. You couldn't take one in the boulder strewn section, certainly. You may be able to probably could in some areas of the zoning or the big pool.

Q. Okay. Now taking a look at this next section so approximately from Zone A to C to where it shows the iron pin on the plat, do you see where that is?

A. Yes.

Q. Okay.

THE COURT: Show me.

A. Sure, Your Honor. Um, here's an iron pin found. It's at the end of or the beginning which ever way you're going L5 line.

THE COURT: Okay. Let's go - - Let's go south to north.

A. Okay.

THE COURT: So, it would be at the beginning of the L5?

A. Yes.

THE COURT: Or at that pin?

A. Yes. That's right then.

THE COURT: Okay, go ahead.

Q. Yes. So, in that area how would you describe the depth of that part of the creek based on your experience walking that area of the property?

A. It's a very shallow - - I was actually walking up there just probably a month or so ago. And it wasn't even over my ankles. It's inches deep in there.

Q. And is that something that you have observed year round?

A. Yes.

Q. And can you describe the terrain of that area?

A. Uh, no, it was all wooded on the west side of the creek and overgrown with trees and bushes but generally it's just (inaudible).

Q. And have you observed any sort of ebb and flow of the tide or any sort of tide in that area?

MS. PEEPLES: Same objection.

A. No.

THE COURT: Overruled.

Q. Alright. So, moving on to the next section so after you get past that iron pin as you go north on Little Antietam Creek so we're going from the iron pin to the A in Little Antietam Creek. Do you see where that is?

A. Yes.

Q. Okay. Can you describe the water depth at that area of the creek based on your experience walking that area on a regular basis?

A. Again, very, very shallow. I was actually there

in that general area just yesterday, had some boots on up to my mid-calf I guess. Totally dry. Inside my boot maybe a couple inches deep.

Q. So, you say mid-calf is that for that whole area?

A. Not even in most places. No, I mean, in some areas it was very (unintelligible) but for the most part it's generally ankle length I would say.

Q. And is there any sort of (unintelligible) or trees down or any other terrain that you can describe in that area?

A. In the general area there is a big tree that is falling I believe from my property across the creek. I do think it's important to note to or maybe talk about it later but I did have some trees on the east side of the Little Antietam Creek in the general area with L the Little Antietam Creek is, Your Honor. These, these trees were overhanging their entire, their root system where their roots or (unintelligible) or whatever you want to call it are entirely on the east side of the Little Antietam Creek on my bank which very clearly on this on this plat shows is my property. And those have been cut several with a chainsaw straight down the - -

THE COURT: That's a, that's a issue for another day.

A. Very well.

THE COURT: That goes to whether there has been

trespass. We're not here today to decide whether there has been trespass particularly. Okay.

Q. And Mr. Estes - -

THE COURT: Hang on a second.

MS. PRAWDE: I'm sorry.

THE COURT: Madam Court Reporter, can you hear Mr. Estes?

COURT REPORTER: Yes, there's a microphone.

THE COURT: Got it.

MR. ESTES: Can you hear me?

THE COURT: I can hear you. Just stay there, you're good.

Q. And Mr. Estes just in this area that we're talking about would you be able to swim or kayak or take an innertube and float in that area?

A. No, not without touching it.

Q. I'm sorry what?

A. Without touching land.

Q. And, now, taking a look at the next section north - - I'm sorry, and as to that section have you ever observed any sort of ebb and flow or any sort of title action or any sort of tides in that area?

A. No.

MS. PEEPLES: Objection.

THE COURT: Overruled.

Q. Alright, looking at the next area. So, from the A in Antietam to the point where Little Antietam Creek meets what we're calling Spring Creek, can you describe the depth of the water there based on your experience regularly walking that area?

A. Generally, it's very, very shallow. I was there yesterday. It went up to about my ankles in almost all areas. There is a pool right where Your Honor wants me to describe it. There's a large pool at the base of where the Spring Creek flows into the Little Antietam Creek where it says L-10 in IPE set. There is a large pool here which is fairly deep but just yesterday I literally walked from this area here in the general IP set, across the creek to my land over here and I was just in boots up to not even my knees (inaudible) dry. Um, but there is an area in this general area where IP set said so it is located there is a pool there that may be in it's deepest spot would be four feet.

Q. And approximately how many feet would you say how many feet long on Little Antietam Creek would you say that pool is?

A. That pool shallows up pretty quickly. I would say approximately down to not even to where L-10, the end of L-10 is located as you're going from east to west. So, where L-10 is.

Q. Would you say - -

THE COURT: If L-10, L-10 indicates that it's L-10 is 47 feet long.

A. Yeah, I'd say. There's an area in that general area give or take that's probably about 40, 50 feet long that one could kayak.

Q. Other than that pool that you were just describing from in this area from A in Antietam to where the Spring Creek meets Little Antietam Creek, other than that pool, would you be able to swim or kayak or innertube without touching the bottom?

A. Can you just repeat that question?

Q. Sure, so, again, just talking about this area from the A in Antietam up to where the Spring Creek meets Little Antietam Creek, not talking about the pool, but talking about the other areas, would you be able to swim or kayak or use an innertube without touching the bottom there?

A. No.

Q. And have you ever seen any sort of ebb and flow or tide in that area?

MS. PEEPLES: Objection.

THE COURT: Overruled.

A. No.

Q. And in that area is there anyone who abuts that

area that we're talking about other than you?

A. No. No. My land exists on both sides of the creek.

Q. And when you described that area other than the pool as being about ankle, about to your ankle, is that something you have observed year round on your walks over the last couple of years?

A. Yes.

Q. Alright. And - -

A. If I may clarify depending upon the flow you might be able to, to kayak somewhere down around L-9 to - - I just - - I don't go down to that exact area all the time. Um, but that has, at times, been deep enough. There's a big sycamore tree which has fallen across the creek bed, which has, I don't know if it's created a pool but in this area sometimes around L-9 that may be.

Q. So, is that, is that an extension of the pool or is that the pool and then it shallows out and it gets a little deeper?

A. Honestly, I can't quite remember. I think it might just be general extension of the pool shallows out a bit but it may be deep enough for kayaking.

Q. Alright, and would you be able to swim, kayak or boat down all of the parts of Little Antietam Creek that are on your property without interruption, without

touching any land?

A. No.

Q. Okay. And I want to switch gears a little and talk about Spring Creek. Um, and you've already identified where the spring head is. Um, and can you just once again identify where Spring Creek is on your property? Or what part of Spring Creek is on your property?

A. Sure. I would say generally it runs from the end of L-10 where the IP set is and runs, the creek actually runs from east to west. So, if we're talking about all of my property Spring Creek actually goes all the way up to the land that came with my original house.

Q. And I just want to talk about the part of the property that's in dispute here, limit it to that.

A. Sure. It's from going from east to west for just solely talking about this piece of land here. It starts north of where N/F Town of Keedysville Liber 332. There was an iron pin found. It runs generally in a westerly north westerly direction. Comes around a bend and meets the Little Antietam Creek generally at the end of L-10 where you see IP (inaudible).

Q. And Mr. Estes are you able to swim or kayak or use an innertube down all of Spring Creek without interruption?

A. No.

Q. And in the area of Spring Creek from where it says IP FND, which I think you were saying was the eastern parts.

A. Yes.

Q. You see where that is? Up until what I'm just going to kind of call the hill so where it meets the hill so that top part, um, just that specific area of Spring Creek. Can you describe what the depth is of that area based on your experience regularly walking the property?

A. So, just for the record we're going from IP found north of town of Keedysville running generally in a easterly north easterly, westerly, north westerly direction to where just south of where it says Forest Conservation Sheet 3 of 3. That area there is very, very shallow, very, very narrow. I've walked there literally once, twice, three to four times a day. There is one small area and it's just, it's just in this general area here, I call it Rivers swimming hole. My dog swims there. I swim there with my child but it's really only my ten year old child, it's waist deep. That's the absolute deepest part. The rest of this area is inches deep, anywhere between absolutely almost entirely exposed, you know, very small trickle of water coming through to, to nothing (inaudible).

Q. And is that your observation of the depth on a regular basis year round?

A. Yes, absolutely.

Q. And is there any sort of terrain, any sort of rocks or trees or anything that blocks passage in any way in that area?

A. I mean there's rocks all sorts of obstructions up in there. There's no way you could get a kayak through there.

Q. And where you talk about the pool that's there, um, yea, I think you said about waist deep, about how many feet is that?

A. I say maybe 15 to 20 feet long I think, Your Honor. You might be able to fit a length of a kayak there, maybe two.

Q. And have you ever observed any sort of ebb and flow of the tides or any tides there?

MS. PEEPLES: Objection.

THE COURT: Overruled.

A. No, never.

Q. Okay. And in the last area I want to talk about is if you take a look at from, again, what we're calling the top of the hill I think where you identified maybe that pool is, (unintelligible) to the west back towards Little Antietam Creek, so just that part of Spring Creek,

how do you describe the depth of that area based on your experience regularly walking in that area?

A. Very, very shallow. Um, right to the south of the Forest Conservation easement area right at the top of the hill is where we described it. And in the general area there's a fork in the creek, Your Honor.

THE COURT: A what?

A. A little fork in the creek where they used to drive tractors across. I still drive my tractor across it. Um, I call it the Ford Creek. I walk across that all the time. It is generally no more than five or six inches deep at its deepest spots all the way across. And, of course there are boulders through there, very shallow areas there as well.

Q. Would you be able swim or kayak or take an innertube in that area?

A. Absolutely not, no. There is one area Mr. Holder had complained to Department of Natural Resources that I had constructed a foot bridge over Spring Creek and that bridge is in, it's hard to explain, it's in this general area here. If you were to go south from zone 13/, I think it's zone 6 in this hatched area it's in this area right here there's a little small bridge. Um, I think it's 13 feet across there. And there's an area that my daughter since the age of five and I go in and get wet

and that's maybe in that area where the bridge is up to.

Q. And in that area of Spring Creek is that are there any other properties other than property, your property, that abuts that in any way?

A. No.

Q. And is there any sort of ebb or flow of the tide or any tide that you have observed in that area?

MS. PEEPLES: Objection.

THE COURT: Overruled.

A. No.

Q. And Mr. Estes, I would ask that you take a seat. I'm going to ask you a series of questions about these photographs. (Mr. Estes returns to witness stand while direct examination continues.) Mr. Estes, you've been handed what's been identified as exhibit 3. Do you recognize this?

(Plaintiff's exhibit 3 was marked for identification.)

A. Yes.

Q. What is exhibit 3 showing?

A. It's a picture of what I call the big pool near the railroad bridge or washed out railroad bridge.

Q. And does this fairly and accurately portray your property or part of the property?

A. Yes.

Q. Did you take this photograph?
A. Yes.
Q. And you said this is by the railroad bridge?
A. Yes.
Q. Okay. And is that on Little Antietam Creek?
A. Yes.
Q. Okay. And, um, approximately how deep would you say the creek was in this area when you took the photo?
MS. PEEPLES: Objection.
THE COURT: Overruled.
A. Clearly it's very, very shallow at the foreground of the pool, couple inches deep at most, maybe six inches. Then goes if you're looking at this, Your Honor, the washed out railroad bridge is generally up in this area here and I can show that to you too.
THE COURT: Pointing into the trees.
A. Yep, up in here. You can see the rock bed that is it's in a distance. This photo was taken a long time ago. My dog is no longer alive. But in this general area it's boulder strewn. You can see that it really does across the entire creek and in that general area.
THE COURT: Which direction is that facing?
A. This is facing south, Your Honor.
THE COURT: Facing south?
A. I am facing south, that's right. And, so, I'm

facing the railroad.

THE COURT: Can I show you something?

A. Yes.

THE COURT: Alright. As you've been testifying I've been marking little things on my plat so I understand where stuff is.

A. Okay. Great.

THE COURT: Big pool I thought you said was down here.

A. Yes.

THE COURT: Okay, so, I had marked big pool as number 2. Okay.

A. Okay.

THE COURT: Not as an exhibit just here on my work.

A. Yep, yep.

THE COURT: So, you're right there at big pool facing down towards the railroad track.

A. You'd be facing - -

THE COURT: That way.

A. - - that way. That's correct, Your Honor. That's right.

THE COURT: Okay.

A. You're at the base of big pool.

THE COURT: Okay.

A. The water - -

THE COURT: Looking down towards the abandoned B&O Railroad as it's indicated on 9186?

A. Yes.

THE COURT: I got it, okay.

A. That's correct, yes. That's exactly right.

THE COURT: Okay.

MS. PRAWDE: And, Your Honor, we would move exhibit 3 into evidence.

THE COURT: Any objection?

MR. HOLDER: No objection.

MS. PEEPLES: No.

THE COURT: Number 3 will be admitted. May I see that? Thank you.

(Plaintiff's exhibit 3 was admitted into evidence.)

Q. Mr. Estes I've handed you what's been marked as Exhibit 4. Have you seen this before?

(Plaintiff's exhibit 4 was marked for identification.)

A. Yes.

Q. Have you taken - - Did you take this photo?

A. Yes.

Q. Okay, and can you identify where this is located?

A. Sure, this is, um, this is my back would be to the area where the washed out railroad bridge is looking

in a northerly direction towards the big pool. Do you want me to show you where it is?

THE COURT: No, I get where you are. So, you're almost - - If I look at exhibit number 3, are you down here looking here or are you standing here and you turned around and shot the other way?

A. The first. We're up - - We're up at the washed out railroad.

THE COURT: So, you're down towards the railroad bridge, now you're looking north?

A. That's exactly right.

THE COURT: Okay, that will be Plaintiff's number 4?

MS. PRAWDE: Yes, and we would move that into evidence, Your Honor.

THE COURT: Any objection?

MS. PEEPLES: No.

THE COURT: Plaintiff's 4 is admitted.

(Plaintiff's exhibit 4 was admitted into evidence.)

A. In Plaintiff's 4 you can clearly see the boulders strewn section.

THE COURT: Okay, I understand. I see it.

Q. And Mr. Estes I've handed you what's been marked as Exhibit 5. Can you identify what this is showing?

(Plaintiff's exhibit 5 was

marked for identification.)

A. Yea, this is a picture that I took awhile ago that is looking, your back Your Honor, would be where Spring Creek enters the Little Antietam Creek. You would be looking in a southerly direction. My land would be to the left of this picture, which would be east. My land is also to the west in this picture as has been determined by this Court and has been recorded in the recorded plats.

THE COURT: So, you're at the conjunction of Spring Creek and Antietam Creek looking south?

A. That's correct, Your Honor.

THE COURT: Okay.

Q. And Mr. Estes is the depth that's reflected - - I guess is what is shown here in terms of the water levels is that generally consistent with how this area of the creek looks on a regular basis based on your experience?

MS. PEEPLES: Objection.

THE COURT: Overruled.

A. I mean, I don't think that the tree in the middle of the creek is there anymore. I think they're probably washed out.

Q. But in terms of the water depth itself?

A. Yes, that's correct. This is, uh, generally the area of the pool that I had said was, you know, a few

feet deep in. You could float it. It was approximately, I think, L-10.

THE COURT: Okay, exhibit 5 is admitted.

(Plaintiff's exhibit 5 was admitted into evidence.)

MS. PRAWDE: We move to admit exhibit 5.

THE COURT: It's admitted.

MS. PRAWDE: Oh, thank you, Your Honor.

THE COURT: Okay, so I'm at Spring Creek looking south.

A. Yes. That's right, Your Honor.

THE COURT: Okay.

Q. And Mr. Estes I'm handing up exhibit 6. Can you identify where this photo was taken?

(Plaintiff's exhibit 6 was marked for identification.)

A. Yea, it's in the same general area where Spring Creek reaches the Little Antietam Creek looking southward, southward down the Little Antietam, it would be up the Little Antietam Creek.

MS. PRAWDE: Your Honor, we move exhibit 6 into evidence.

THE COURT: Any objection?

MS. PEEPLES: No, no objection.

THE COURT: 6 is admitted.

(Plaintiff's exhibit 6 was admitted into evidence.)

THE COURT: Which way are you facing?

A. I am facing to the south, that's right.

THE COURT: And that's Little Antietam Creek there?

A. That's correct.

THE COURT: It's just a little bit different location than exhibit 5?

A. Yes.

Q. Mr. Estes can you look at exhibit 7. Can you identify - -

THE COURT: Can we go back to 6 real quick?

MS. PRAWDE: Yeah.

THE COURT: Looking at Exhibit number 6 looking down Antietam, what is that, about halfway down the creek here seems to be something in the creek?

A. That's uh, that's (inaudible), Your Honor.

THE COURT: Okay.

A. Small riffle which is not even - - Very well.

THE COURT: Okay.

Q. And Mr. Estes, looking at exhibit 7, um, can you identify where this is?

(Plaintiff's exhibit 7 was marked for identification.)

A. Yeah it's same general location. The - -

Q. I'm sorry.

A. - - conversions of the Little Antietam Creek and Spring Creek.

Q. Sort of what's shown sort of going on the middle in the water is that land or is that something else?

A. It's land. Land.

Q. And would you be able to swim or to kayak or to take a tube in this area?

A. No, no. I mean certainly not where the areas of dry land are shown. And you have exposed land. Again, in the foreground, there's a pool where you could conceivably float something. I don't know if you touch land there or not.

THE COURT: Any objection to Plaintiff's 7?

MR. HOLDER: No, Your Honor.

MS. PEEPLES: No objection.

THE COURT: 7 will be admitted.

(Plaintiff's exhibit 7 was admitted into evidence.)

Q. Mr. Estes, can you identify where exhibit 9 is?

(Plaintiff's exhibit 9 was marked for identification.)

MS. PEEPLES: 8?

MS. PRAWDE: Uh, I'm skipping over 8.

MS. PEEPLES: Okay.

MS. PRAWDE: So, this will be 9.

A. Yes, I took this picture. This is looking - - You're at the base of the big pool near the washed out railroad bridge and you're looking southward towards the washed out railroad bridge and the Little Antietam Creek.

Q. And is this area where you could swim or kayak or use a tube?

A. The area in the foreground certainly not. It's no more than a few inches deep. Once you get up as I've testified to, towards the area of the big pool you conceivably float that but you'd have to go across my property, which is shown where the boulder strewn area is.

Q. Okay.

THE COURT: Any objection to 9?

MS. PEEPLES: No objection.

THE COURT: It will be admitted.

(Plaintiff's exhibit 9 was admitted into evidence.)

Q. Mr. Estes, can you identify where exhibit 10 is showing?

(Plaintiff's exhibit 10 was marked for identification.)

A. Yeah, exhibit 10 is in the general area of the where the Little Antietam Creek and Spring Creek come

together.

Q. And is that area deep enough to kayak?

A. You may be able to kayak somewhere around the base of the, the large sycamore tree on the right hand side of the picture. That may be deep enough there. Talked about that general area when I was up at the map. But that's a small section.

THE COURT: Any objection to 6?

A. 10.

MS. PRAWDE: 10.

THE COURT: Oh, I'm sorry, 10.

MS. PEEPLES: Your Honor, if it streamlines this if she's just going to keep introducing photographs that Mr. Estes took, I mean, I think, I don't have an objection to them continuously being entered.

THE COURT: Okay. Number 10 will be admitted.

(Plaintiff's exhibit 10 was admitted into evidence.)

THE COURT: Which direction are you facing here?

A. That is facing down stream on the Little Antietam Creek so Spring Creek would be approaching from your right.

THE COURT: Okay.

A. And this would be looking down stream - -

THE COURT: Which is sort of north.

A. Yes.
THE COURT: Okay. Understood. Thank you.
Q. Skipping a little bit, this will be 13.
(Plaintiff's exhibit 13 was marked for identification.)
THE COURT: Are we skipping 11 and 12?
MS. PRAWDE: Trying to streamline things a little bit.
THE COURT: Okay.
Q. Mr. Estes, taking a look at exhibit 13. Can you identify where on your property this was taken?
A. Yeah. This is taken from the east bank of my property looking up of the Little Antietam Creek, looking upwards towards the washed out railroad bridge, the area of the big pool.
Q. And is - -
THE COURT: Without objection exhibit 13 is admitted.
(Plaintiff's exhibit 13 was admitted into evidence.)
MR. HOLDER: Yes, Your Honor.
MS. PEEPLES: Again, Your Honor, so long as they're all photographs and what not that Mr. Estes took I don't have any problem with them being admitted, you know, no objections to them. I'm just trying to streamline the process.

THE COURT: Understand. How many photos do you have?

MS. PRAWDE: Trying to cut through. I will edit myself here. Um, there's about 15 more. So, I will try and cut back on it a little bit.

THE COURT: I'm not suggesting you do that. I'm saying do you just want to make one big exhibit, hand it to him and he can say I'm at here looking north; I'm at here looking south; I'm here looking - -

MS. PRAWDE: Sure, I can do that.

THE COURT: If you want to.

MR. HOLDER: I think they're all identified with like the bate stamp what she's handing in so she could just put a list of what they are.

THE COURT: But I don't want to limit you. If you want to do one at a time, Ms. Prawde, it's fine. This is what the creek looks like is relevant.

MS. PRAWDE: Um, I can do that. I don't see a bate stamp on some of on a lot of these or at least it's hidden.

THE COURT: Okay.

MS. PRAWDE: So, if I can just put them in a pile and just say first page, second page, third page.

THE COURT: Yes.

MS. PRAWDE: We can do that.

THE COURT: That's fine with me. I don't want to

limit you but we are at 3:10. Let's do this. Let's take a five minute break.

MS. PRAWDE: Thank you, Your Honor.

THE COURT: Why don't you get them organized and let's maybe try to do the remainder as one exhibit. Would that be okay, Madam Clerk? Are you okay with that, Madam Clerk, if we do one exhibit?

CLERK: That's fine.

THE COURT: Okay.

MS. PRAWDE: Thank, Your Honor.

THE COURT: Yes.

(Whereupon at 3:07 p.m. court was in recess and resumed at 3:18 p.m. Witness Ben Estes retakes the witness stand and direct examination by Ms. Prawde continues:)

THE COURT: You may have a seat. Ms. Prawde.

MS. PRAWDE: Thank you, Your Honor.

(Plaintiff's exhibit 14 was marked for identification.)

Q. Mr. Estes I have handed you what's been marked as Plaintiff's exhibit 14. I'm going to try my best to keep us organized. Not all of these have bate stamps. I'll just be identifying page 1, page 2, page 3 as we flip through. So, taking a look at the first page of Exhibit 14 can you identify where this is?

A. Yeah, this is the Little Antietam Creek generally south of the, where the Little Antietam Creek and Spring Creek come together.

Q. Taking a look at the second page. Can you identify where this is?

A. That's also the Little Antietam Creek in same general area. Your back is on the east side, Your Honor, of, of this picture.

THE COURT: So, you're looking west?

A. That's exactly right, yes. Across the Little Antietam Creek.

THE COURT: Go ahead.

Q. And taking a look at exhibit, I'm sorry, page 3, can you identify who took this photograph?

A. My wife took this photograph.

Q. And is that you there in the picture?

A. Yes.

Q. And can you identify where this is?

A. This is the Little Antietam Creek between where the Spring Creek - -

THE COURT: Keep them there.

A. Okay. I don't think you need to see them.

THE COURT: Between Spring Creek and what?

A. And between - - It's on Little Antietam Creek between where the Spring Creek enters into Little

Antietam Creek heading up towards the washed out railroad bridge.

THE COURT: Okay. About how far down do you think?

A. Uh - -

THE COURT: If you look at my little thing there's the Spring Creek, Antietam Creek, how far down?

A. Is that A?

THE COURT: Right there?

A. Yeah.

THE COURT: That's a 4.

A. Yeah, in that general area.

THE COURT: Okay, so near the word "A" of Antietam Creek on 9186?

A. Yeah.

Q. And how deep is this area?

A. I don't even think it's over my flip flops to be honest with you.

Q. And how recently was this photo taken?

A. I think this was on October of this year.

Q. And taking a look at the next page, exhibit, page 5, I'm sorry.

THE COURT: 4.

Q. 4. Can you identify where this is?

A. This is the Little Antietam Creek up near the base of the big pool near the railroad bridge.

THE COURT: Got it.

Q. And page 5, can you identify where this is?

A. This is kind of important I think. This is - - This is Spring Creek, Your Honor, on my property, near my property or on my property, excuse me. It's in this general area where I first met Mr. Holder and Mrs. Holder.

THE COURT: So, that is Spring Creek?

A. That is Spring Creek, that's correct.

Q. Can you identify where, roughly where in Spring Creek that is?

A. Um, sure. My house you can see it is, is up in this general area here. Do you want me to go to the map for you?

THE COURT: No, I'll help you here. I don't want to be keeping you getting up and down. So, as Spring Creek flows east to west we started our discussion right at the corner of the town property.

A. Yeah.

THE COURT: We then went up around the bend.

A. Right.

THE COURT: And then the north end of the bend.

A. Right.

THE COURT: And then it meets then we go to the footbridge.

A. Okay.

THE COURT: So, where are you? Are you at the beginning of the town property?

A. That's exactly right.

THE COURT: So, you're at the town property generally?

A. Generally speaking, yep.

MS. PRAWDE: Your Honor – -

THE COURT: Does everybody understand what corner I just talked about?

MR. HOLDER: Yes, Your Honor.

THE COURT: Do you know what I'm talking about Ms. Peeples?

MS. PEEPLES: Yes.

THE COURT: Okay. Right where the Spring Creek flows into the property at issue here right at the norther corner of the property labeled Town of Keedysville on plat 9186. Okay.

MS. PRAWDE: Your Honor can I approach with Exhibit 2, which is just the plat for his reference for description (unintelligible).

THE COURT: Yes. Sure.

MS. PRAWDE: Thank you.

THE COURT: So, now we're on page 6 of the photos?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Go ahead.

Q. Mr. Estes can you identify page 6 where this was taken?

A. Yeah, this is also on Spring Creek.

THE COURT: Yes.

A. It is generally sort of near my, where my existing dwelling is. If you were to go sort of south and east towards well I'd say almost due east of my existing property dwelling. That's what the Spring Creek looks up in that area.

THE COURT: Understood.

A. Very well.

Q. Page 7, can you identify where this was taken?

A. Yeah, this is the rock strewn boulder area up near the, the railroad bridge, washed out railroad bridge.

THE COURT: Understood.

Q. Looking at page 8. Can you identify where this is?

A. Yeah, this is the Little Antietam Creek, Your Honor.

THE COURT: Yes.

A. Um, this is approaching the base of the big pool on the Little Antietam Creek.

THE COURT: The southern end of big pool or the

northern end of the big pool?

A. This would be the northern end, Your Honor.

THE COURT: Okay.

Q. Taking a look at page 9, can you identify where this was taken?

A. Sure. This is a picture. My house is in the background. This is Spring Creek also generally in the area where I first met Mr. Holder near where we - -

THE COURT: Near the Keedysville property?

A. Yes, yup, generally speaking, yes, same area.

Q. And Mr. Estes can you identify page 10 what this is showing?

A. Sure. This is the entrance to Spring Creek from Little Antietam Creek. You can see my No Trespassing sign, which is posted on the on the tree there. That's been there since at least 2018.

Q. And is that still there?

A. Yes, it's still there.

Q. About how many No Trespassing signs do you have on the property?

A. Uh, they're all over the place. So, I would say I went through a whole bundle of fifty. It depends upon where you're talking on my property but down around the creek there's at least one, there was another one two, three, four, at least four on Little Antietam Creek or

around the Little Antietam Creek I would say.

Q. As well as on Spring Creek?

A. Or had been there. Spring Creek I don't think I have posted no.

Q. Alright. Taking a look at page 11. Can you identify where this is?

A. This is, just for the record, this is looking up Spring Creek. And I described the - -

THE COURT: So that's looking east?

A. Yeah.

THE COURT: The photo is east towards east?

A. Yes, yep.

THE COURT: Okay.

A. And I described a little peninsula dry land. That's the dry land.

THE COURT: Okay.

A. Very well.

THE COURT: Page 11.

Q. So now can you look at page 12?

A. Yep.

THE COURT: I think we're still on 11.

Q. I'm sorry. Can you hold up Mr. Estes what you're looking at?

THE COURT: Not that one. Go to the next one.

A. Yes, sir.

Q. Page 11.

A. Is it marked as page 11?

THE COURT: It doesn't matter. I'll mark them later. Where is that?

A. This is at the conversions of the Little Antietam Creek and Spring Creek. Spring Creek would be flowing in from right to left. The Little Antietam Creek would be flowing from the left. This is looking downstream on the Little Antietam Creek. I described an area of floatable pool at the convergence of the Little Antietam Creek and Spring Creek. That is generally in this area. I said that you may be able to float an area on the Little Antietam Creek just south of the convergence of the two and said it was probably about fifty feet long I think. I think that's in this general area. And that's the sycamore tree I think which I described as having fallen down on the creek in that area.

THE COURT: Got it.

Q. Taking a look at page 12, can you identify what this is showing?

A. Yeah, this is a picture that I took of the water level when I crossed the creek sometime in October. This is at the ford of the creek and I think this is the, the deepest part of the ford of the creek. I described the ford in the creek. My testimony earlier where I drive my

tractor across and I walked across and never get wet. What I did is I just stuck my roller in the water at the deepest part that I could find on that day and it was I think six inches deep.

THE COURT: My recollection was at the ford of the creek was on the Spring Creek.

A. That's correct, Your Honor, yes. That's right.

Q. And Mr. Estes taking a look at the next page, page 13, who took this photo?

A. My wife took this photo.

Q. Alright. And can you identity where this is showing?

A. Yeah, this is Spring Creek as well. This is right around the area of where my little foot bridge is and still is today. That's where it is. And I'm holding a, excuse me, sorry about that, a measuring device and it's only inches deep there. You can see that it's only - - I don't even think it's over my flipflops in that area.

THE COURT: Okay.

Q. And Mr. Estes if you will look at page 14 and identify what this is.

A. Yeah, this is, um, this is the Spring Creek, Your Honor. Um, this is in an area where the Spring Creek meets the Little Antietam Creek.

THE COURT: Okay.

A. In order to walk up towards the bridge on the property you have to walk out of Little Antietam Creek which is shown here and walk up through this area here and this is a general area where I have, Mr. Holder took a video of himself out there.

THE COURT: Okay.

A. In this general area. And it's only, I was there yesterday, again, didn't go over my ankles, a couple inches deep. Maybe six inches deep at most.

Q. Taking a look at page 15, can you identify where this is?

A. Yep. This is Spring Creek. If we're looking at Spring Creek this is near my home and this is in the general area where I first encountered Mr. Holder and his family.

THE COURT: Okay.

A. Um, this area is only inches deep. Again, and if I'm looking at Exhibit 2 this would be in the general area I think 229 mark.

THE COURT: I see it.

Q. And where was Mr. Holder's family when you encountered them?

A. Generally speaking, in this area down in here.

Q. So, you're pointing towards in the water?

THE COURT: Okay, just within the water?
A. Within the water.
THE COURT: Okay.
A. Standing on the land in the riverbed.
Q. And about, okay. Page 16, can you describe where that is?
A. Yeah. Spring Creek where it enters the Little Antietam Creek. This is also an area where Mr. Holder would have to walk up and has a video taken of himself walking up this area. You can see it's only a couple inches deep, no kayak when he was there but I guess - -
Q. And when you say walking up that area you're talking about within the water?
A. Within the water on the land, that's correct.
THE COURT: Okay.
Q. And page 17, can you identify where this is?
A. This is the Little Antietam Creek, Your Honor. In the general area where the Little Antietam Creek meets the Spring Creek. You would be heading generally in a southerly direction from where they come together.
THE COURT: Okay.
A. And you can see an individual over there weed wacking. In this general area on both sides of the creek.
Q. And do you know who that individual is?

A. I do not know who that individual is, no.

Q. It's not someone you hired to do any weed wacking work?

A. No, absolutely not.

Q. And is that land where that individual is standing is that part of your property?

A. Yes, as far as I can tell. I can't see the property markers right here but in the general area, yes, I own land on both sides of the creek there.

Q. And the last photo I'm going to show you is page 18. Can you identify where this is?

A. Sure. This is at the conjunction of the Little Antietam Creek and Spring Creek where they come together. And you're looking in a southerly direction. This here to the left is where Spring Creek runs into Little Antietam Creek here, Your Honor. I own according to plat 9186 and 10955 all this land over here. You can see that someone has placed a No Trespassing sign there and video surveillance sign. I did not place that there myself. You can see very clearly Mr. Holder standing there on dry land taking a photograph, apparently, but that's where it is.

Q. Okay. And I would move exhibit 14 into evidence.

THE COURT: Any objection to 14?

MS. PEEPLES: There is an objection to this one, Your

Honor. Twice Mr. Estes stated that these photographs were taken in October which was beyond the discovery deadline in this case. And thus the, I mean they're not bates labeled. They are late produced. And I think that to the extent that this information only shows a snapshot in time taking after the discovery deadline they should be excluded.

THE COURT: All of the photos were after October?

MS. PEEPLES: The photo with the - - Ms. Prawde did not ask him when each photo was taken but he twice mentioned any photos where he's walking with his flip flops he's mentioned that those were taken in October. He mentioned it twice. One with respect to, I want to say the 5th photo and then the others with respect to the photo that has the measurement with the tape measure. I don't know when the rest of these were taken because there's no testimony to that. But to the extent - -

THE COURT: Page 5 and page 12.

MS. PEEPLES: Correct. To the extent that any of these were taken and or produced after the discovery deadline I don't. I've see a bazillion pictures in this case, Your Honor. But to the extent that his own testimony puts them beyond - -

THE COURT: When was the discovery deadline?

MR. HOLDER: March.

MS. PEEPLES: Yea, we were originally supposed to have trial in October, Your Honor. So, the - -

THE COURT: Okay. Okay. Page 5 and page 12, Ms. Prawde are the two photos that Ms. Peeples - -

MS. PRAWDE: Your Honor, yes - -

THE COURT: - - saying that they might be, have been taken in October.

MS. PRAWDE: I would represent that not all of these were taken in October. Some of these were taken many years ago. And we can get testimony if you need it. Um, we did produce some additional documents in October in anticipation of trial to show the Court and to show the parties what the property looked like at that moment for injunction purposes. To give a snapshot at that time would be helpful for injunction.

THE COURT: Um hum.

MS. PRAWDE: You know, the trial did not occur in October.

THE COURT: Right.

MS. PRAWDE: The parties have had this for multiple months.

THE COURT: Yeah.

MS. PRAWDE: We've received voluminous documents from Mr. Holder passed the discovery deadline.

THE COURT: Okay.

MS. PRAWDE: We would ask that all of these photos be admitted.

THE COURT: Any further comment?

MS. PEEPLES: My only comment would be, Your Honor, if you were, you have been, as you have been in the other cases before you, you have been a stickler for discovery deadlines in Motion for Summary Judgment deadlines and a bunch of other deadlines and in consistent with your past rulings in this case and in others I would just submit that the rules are the rules. I have not tried to submit anything beyond discovery in respect for that I don't think that anything late coming to the court particularly we're beyond especially with respect to your case management order in an abundance of caution I even filed a letter to file motions in limine which pertains to the next part of this trial.

THE COURT: Right.

MS. PEEPLES: Right.

THE COURT: That's why I haven't ruled on that.

MS. PEEPLES: I haven't filed them yet just because I didn't want to bog you down with matters not before you.

THE COURT: But even if whether I even ruled on your letter yet to grant you - -

MS. PEEPLES: You did. You did.

THE COURT: Did I grant you. But later right?

MS. PEEPLES: You did.

THE COURT: Okay.

MS. PEEPLES: It was later.

THE COURT: Yes, I appreciate you realizing what I was saying.

MS. PEEPLES: With the posture of this case and with the posture that we have to seek leave of court even to file motions, if these were produced in October, November, with a trial date in December I just, I think it's, it's impractical for counsel to have to deal with late discovery. I'm only sitting here today realizing that they were taken in October.

MS. PRAWDE: And Your Honor, again, I would say there's no prejudice to the parties. These were produced before the date of the trial that was supposed to occur I think October 4. Um, the parties have had these for multiple months, and again, it's used for injunction purposes to see the property within the last couple months.

THE COURT: But say I guess I in making you put them all together as one exhibit I'm concerned that I might have confused certain dates that certain photos were taken, right. What do you want to say Mr. Holder?

MR. HOLDER: Oh, I was going to say we could sit here and spend three hours having Mr. Estes testify do his

memory. But a picture is worth a thousand words. I don't feel like dealing with in on appeal. They are pictures of the property. They are relevant.

MS. PRAWDE: And, Your Honor, Mr. Estes has - - My last point he's already testified - -

THE COURT: Thank you.

MS. PRAWDE: - - that the property sort of year round over the years has been consistent.

THE COURT: But I'm hearing your concern is picture 5 and picture 12.

MS. PEEPLES: That's correct, Your Honor. And to the extent that any motions or what not would have been filed late production of these documents would not give me an opportunity to file any motions in limine because I think that in order to have an accurate picture of the river a snapshot in October that's not taken the same time of, in the same spot at different points of the year is really just a cherry picked shot of what, what wants to be shown to this Court. Obviously, I can address that in cross-examination. However, at the same time I just - - We stopped doing discovery when discovery was over.

THE COURT: Yes. Well, I have picture number 5 as this one.

MS. PEEPLES: It's the, the ones that Mr. Estes is referring to I believe are the ones that his wife took

where he's in the creek with his flipflops. Here's another one with flipflops. Then there is the one with the tape measure. There's another one with flipflops.

THE COURT: Alright, stop. These photographs where you are wearing a grayish brown zip-up jacket would appear to be blue shorts and flip flops.

A. Yes.

THE COURT: When did you take - - When were these photos taken?

A. October of this year, Your Honor. If I may have a second to talk to my counsel?

THE COURT: That's okay, no.

MS. PEEPLES: And Your Honor - -

THE COURT: No, no, no.

A. I'm sorry.

THE COURT: You don't get to talk to people during examination.

MS. PEEPLES: I would just further proffer that had discovery been ongoing and these pictures been produced in accordance with discovery I'd have been standing out in the creek doing my own research.

THE COURT: Okay. The ones that I can tell if he's wearing flip flops and blue shorts and he's carrying a tape measure are number 3, 4, 7, and - - 3, 4, 7, 12 and 13. Those will not be admitted.

(Plaintiff's exhibit 14 admitted in part.)

MS. PEEPLES: Thank you, Your Honor.

THE COURT: Madam Clerk, do you want me to remove pages 3, 4, 7, 12 and 13 and give them to you separately?

CLERK: Yes, please.

THE COURT: Okay. 3, 4 - - I'm sorry. 3, 4, 8. 3, 4, 8, 9, 10, 11, 12 and 13. 3, 4, 8, and 13 are removed. I'm handing them to the Clerk now. They will not be part of exhibit 14. The remainder of the photographs of Plaintiff's 14 are admitted.

Q. Mr. Estes, have you seen Mr. Holder and Ms. Holder on your property?

A. Yes.

Q. And where have you seen them on your property? I know you mentioned it before but if you could just give us a full description.

A. Sure. I first encountered Mr. Holder and Mrs. Holder on my property I think it was in the summer of 2018 or 2019. I apologize. I don't know the exact date. But I know the location and that is in the general area as I have described it before in the area of 229-29 just north of the Town of Keedysville iron pin found on Exhibit 2 9186.

Q. And on that time when you saw them what were they

doing?

A. They were wading in the creek.

THE COURT: They were what?

A. Wading.

THE COURT: Okay.

Q. And did you have any conversations with them about it being private property or about them needing to leave or any other conversations?

A. Yes actually.

Q. What did you communicate to them?

A. I told them I came out and I had my wife with me and I think my dogs were with me and we came out and encountered Mr. Holder and I think as Mrs. Holder. I don't know her personally. But Mrs. Holder as well as I think they had some children with them.

Q. Did you see them any other times?

A. Yea. Uh, I have seen them.

Q. And where was that?

A. I first encountered agents I guess of the Holders, their children. They were at I first encountered them about the ford in the Spring Creek, Your Honor. And when they came up and this was the summer of 2018, 2019. A couple of kids were in the creek playing. I came out and said hey look, you know, this is private property. You really can't be here. But you know what

there's a spring head right up there go ahead and walk on up there if you'd like. And you're here already. Go ahead. And they continued on and that was it. And then the very next day is when I first encountered, I think it was the very next day Mr. Holder and Mrs. Holder and the children. Mr. Holder and Mrs. Holder for the first time coming up onto my land in the area of IP the IP found near the Town of Keedysville. Again, asked him to leave. But I said look this is private property. You can't be here. We have dogs. You know, we just like our peace and quiet. Please don't you know, it's private property. But if you want to you are here already go ahead and continue on up and do what you were doing and look at the springhead it's right there. But it is private property.

Q. And when you saw the children - -

MS. PEEPLES: Your Honor, I just move to strike the characterization of the children (inaudible).

THE COURT: It will be struck.

MS. PRAWDE: I'm sorry?

THE COURT: It will be sustained. Mr. Estes referred to the children as the agents of Mr. and Mrs. Holder. Sounds a little technical. It's their kids.

MS. PRAWDE: Ok, I didn't hear what you had said. Okay. Thank you.

Q. Any other times that you saw the Holders or their

children?

A. Yea, I saw Mrs. Holder who I presumed to be Mrs. Holder and children in the area of the Little Antietam Creek in the general area of where the first or second "t" in Antietam Creek showing on 9186. I've also seen Mr. Holder personally in the area where it says Little Antietam Creek. Mr. Holder was across the creek standing on the shore of the west bank. He approached from the west, ran down the hill, past the property markers all the way up to the edge of the creek yelling and screaming at me. And this is after I told him not to come on my property.

Q. And the times when you saw the Holders or their children in the creek about how deep was the water then?

A. Anywhere from ankle deep to knee deep maybe, maybe.

Q. And did you see any kayaks, innertubes anything like that?

A. No. No fishing rods, no kayaks, no canoes, no anything.

Q. And have you seen any photos or videos of Mr. Holder on your property or Ms. Holder on your property. I know we already talked about one as part of exhibit 14, any other instances?

A. Absolutely. Like I just said Mr. Holder I think

it was in January of February after I told him to stay off the property. He had sent me a very, very threatening email, which contained a song link that's I've never met Mr. Holder once in my life. It was a song by the band Tool, heavy metal song. In that song the words essentially go and I apologize to the Court but, "You're wading in the quicksand. You are a," something, "M'Fer, keep wading in, keep wading in. You may never come out again." The very next day Mr. Holder comes running down the Spring Creek come together and meet. He was standing on the west bank of the Little Antietam Creek on that day. Um, I've also seen Mr. Holder provided a video as part of discovery. And Mr. Holder apparently took a video of himself way out near my bridge on Spring Creek standing ankle deep in the waters of the Spring Creek actually standing on the earth. No kayak, no canoe, no fishing pole.

THE COURT: And that was near the footbridge?

A. That's exactly right, Your Honor. Just south of the footbridge.

THE COURT: Okay.

Q. Mr. Estes, in your twelve years of living on the property have you seen anyone besides the Holders in either creek in the portions of your property who are not invited to be there?

A. Just on a couple of occasions. I've seen some children there, Your Honor. I think on two different occasions. Just kids from their neighborhood wading up to the Spring Creek in the area of my bridge, the little footbridge over the Spring Creek as well as in an area on the Little Antietam Creek there just sort of wading and playing in the water. I let them know that it's private property and that they should leave. I also encountered a fisherman in the area on Plat 9186 that's sort of due east to my house. They were a man and his son were fishing up in there and I just came out and said, "Look, you know, this is private property. You can't be here." But then, and so they left. And I told them where they could fish locally but then I felt really badly because I grew up poor, absolutely poor. No property to my name. And this is a father and his son just going out and trying to fish. So, I went down, found where they were fishing and invited them back to my house and to fish in that area and to wade and walked them all the way up to the area of the washed out railroad bridge and let them fish at their leisure up there.

Q. And that was with your permission and knowledge?

A. Yes, that's right.

Q. And in your twelve years any other times you've seen any other individuals on your property that you

weren't on your property that you didn't invite them?

A. In the area of the creek?

Q. Walking in the creek or in the creek?

A. No, no, just my invitees if we want to be, you know, our friends, friends of our children, we allow them to come and walk because they will.

Q. In the twelve years you've lived there have you ever seen anyone kayaking in Little Antietam or Spring Creek?

A. Never.

Q. Have you ever seen anyone in any sort of boat, canoe, any other sort of vessel?

A. Never.

Q. Ever seen anyone in an innertube?

A. Never.

Q. Have you ever seen anyone swimming in Little Antietam Creek or in Spring Creek that you didn't invite to be there?

A. No. Just wading and splashing - -

THE COURT: Except for those two kids?

A. Yes.

THE COURT: Except for the kids on the two occasions?

A. And the Holders.

Q. And the kid that you saw there were they wading or were they actually swimming?

A. Wading. Just wading.

Q. And in your twelve years of living there other than the fisherman and his son that you mentioned have you ever seen anyone fishing in the creek that you didn't invite to be there?

A. No, no. Never, Your Honor.

Q. And lastly Mr. Estes, why are you seeking to enjoin the Holder or what are you seeking to enjoin the Holders from?

A. It's a long-winded answer.

Q. Just what are you seeking to enjoin them from?

A. I'm seeking to enjoin the Holders from walking anywhere on my property including the riverbed if that's what we wish to call it. Not only the Little Antietam Creek but the Spring Creek where they run through my property and over my property. I'm not seeking to enjoin them in areas where Uncle Eddie's has ownership rights. I think there may be one point, you know, that's their land. If that's what the Court has determined. I'm not sure if there's a point or not. On Plat 10955. But the reason why - -

Q. My next question is why are you seeking to enjoin them from being from walking in the creek?

A. Sure.

Q. Or seeking to enjoin them from being on your

property at all.

A. Your Honor, I haven't thought about this much, but and I apologize if I go too long. But I grew up next to nothing. My father was a retired military man but we grew up in the woods of Maine, Vermont, living as we could. He couldn't pull his pension for some time. We moved to a nice town in Massachusetts so that I could get a good education. We rented out rich peoples summer homes. Lived in tents and camps in the summer. So, I would take my exams in high school often times from tents. So, I grew up with nothing. Worked through college at Harvard, worked through college, law schools, and pharmacy schools and I value the land as I bought it. I value the privacy. I've worked my entire life to purchase this piece of property. And I was once in law school many years ago and I was living in a city working at a big firm and I knew that law school and the practice of law was not for me. And the real reason why is because I had a dog that changed my life. I know it sounds strite but I adopted a dog from the pound and he changed my life and my perspective on life and what I wanted. And what I wanted was to have some land, wanted to have some seclusion and I promised that dog that I would spend my life trying to provide a life like that to other animals from shelters, from foster homes. And to

do that in privacy where we can enjoy it. And I wanted a family and I wanted to raise my children in an area in the country near clean water where we could live in peace and quiet. Mr. Holder, Mrs. Holder, and Uncle Eddie's have completely destroyed my peace and solitude. Mr. Holder came running sent a threatening song to me, threatening my life saying, "you may never come out again." The very next day he runs past the property markers that his surveyors and Mrs. Holder's surveyors and Uncle Eddie's surveyors had placed, ran right across those and to the very edge of the bank yelling, screaming, hollering at me. He then, not only did he do that, but he called the Maryland Department of the Environment invited them out to enter onto my property at the conjunction where the Spring Creek and the Little Antietam Creek come together, invited them there with Mrs. Holder's permission to come and report violation that I had put in a small footbridge and that there was some water pipe, which still sits there on the edge of the bank and what you'll probably see in a video later on. So, I had to deal with that. Then he sues me for defamation of character, for apparently bothering some piece of land, which I don't even know where it is, in which I believe this Court has found, does not even exist, filed suit against me, my wife, approximately

twenty different individuals, sued me for defamation of character and the like. So, he has destroyed by peace and my solitude that I have worked for my entire life. And has done so repeatedly. And he has shown unabashedly that he shows no respect for the property lines that his own surveyor placed in Mrs. Holder's own surveyor placed. And is willing to threaten me and to harass me. And he also, Your Honor, on the very day when he came running down the hill, I was walking my dogs as I do any normal day, ran up to me, started screaming, "I'm right here. I'm right here." And then he started whistling to my dogs (witness whistles). Then Mr. Holder has the audacity to call Animal Control and say that my animals are out of control when he himself was whistling to them to get their attention.

MR. HOLDER: Objection to hearsay testimony, Your Honor, what I told Animal Control.

THE COURT: Overruled.

A. Then, Mr. Holder - - I continued on my walk. Then Mr. Holder continued to walk up the west bank of the Little Antietam Creek screaming at me. "I'm going to be here every day. I'm going to cut down all these trees. I can't wait." Um, yea. And then after, you know, all of this, "I love dogs. I love dogs." And, so, Mr. Holder here today shows very different side, a very

different person than what he is in real life. So, he's interrupted my solitude, my peaceful enjoyment of my land, all the areas of my land. He's threatened me. He's threatened my animals. He's threatened my property. He shows absolutely no regard for the rule of law or for property rights. I think that's about all I can, I can say.

MS. PRAWDE: Uh, I have nothing further.

END OF DIRECT EXAMINATION

THE COURT: Okay, Ms. Peeples, do you have questions for the witness?

MS. PEEPLES: Yes, Your Honor.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MS. PEEPLES:

Q. Good afternoon Mr. Estes.

A. Good afternoon.

Q. And you know you and I have had a dog question before or a dog conversation before so please don't take what I say (unintelligible) because you and I are on the same page about a great many things. Um, in terms of your collegiate studies have you ever had any kind of education, training or experience in civil engineering?

A. Civil engineering?

Q. Yes.

A. No.

Q. Have you ever in terms of your experience done any kind of water studies?

A. Yes.

Q. When?

A. Um, biology class I believe. Probably at Hagerstown Community College. There was water flow studies that we did on Crystal, Crystal Creek, something like that. But, I do know how to use a measuring stick.

Q. Did you ever undertake any studies with regard to rivers, streams, creeks, flow of rivers?

A. I think I just answered that but, yes - -

THE COURT: Just answer it.

A. - - Yes.

THE COURT: Answer the question.

A. Yes.

Q. Do you know the definition of a title creek?

A. I'm not sure how to - -

MS. PRAWDE: I'm going to object to what definition.

THE COURT: Where are we going here. I mean he's trained as a lawyer and as a pharmacist. I think if you're, if you're point is he's not a water engineer he'd probably agree with that.

Q. Okay.

THE COURT: Would you agree with that? You're not a

water engineer?

A. I'm not a water engineer or a civil engineer, no.

Q. You presented in testimony today many photographs of the Little Antietam Creek and the Spring Creek that you have taken. When did you first begin taking these photographs?

A. Years ago, years ago. Um, I've been there for twelve years so I don't know the exact date. My dog Sledge is a big heavy set dog, um, he died two years ago, so they're at least two years old.

Q. Were these photos taken in connection with this litigation or were they taken as part of your personal photos prior to the institutional litigation?

A. Both, I believe.

Q. Do any of these photos date back to prior to your encounter to Mr. Holder?

A. Yes.

Q. The ones with your dogs?

A. Yes. I don't know the exact date that I took those but I can say that after my encounters with Mr. Holder, you know, my desire to walk on my own land anywhere near Mr. Holder, Mrs. Holder or Uncle Eddie's property has diminished significantly, which has certainly bothered my quiet enjoyment of my land. So, um, my guess is that yes, those, and it's just a guess,

is that those pictures are taken well before the time that I met Mr. Holder.

Q. Okay. So, looking, looking at some of the pictures that you produced, for example - - May I approach?

THE COURT: Yes please.

Q. This one is labeled Estes 0411.

A. Yes.

MS. PRAWDE: Just to be clear, are we talking about April the 14th?

MS. PEEPLES: This might have been produced - -

MS. PRAWDE: It's in the packet.

MS. PEEPLES: It's one that's basically his.

MS. PRAWDE: Okay. So, exhibit 14.

MS. PEEPLES: I believe so.

Q. Do you know when that was taken?

A. Probably it was definitely since I met Mr. Holder. I think those signs were placed there presumably by Mr. Holder and Mrs. Holder in 2020. So, my guess it's sometime in 2020.

Q. Do you know what time of year this photograph was taken?

A. Well looks like there aren't many leaves on the trees. I think it's springtime. It was springtime.

Q. Spring. Anything better than spring like could

it have been March or May? Do you have any recollection as when this was taken?

A. No. Not an exact date. But I do think it's important to clarify that I live there. I've lived there. I've lived there for twelve years. I walked these areas every single day. And I'm not exaggerating, Your Honor. I've walked these areas when I first had my first set of dogs, two or three times a day for years. And the water is generally as they're shown in those pictures. Absolutely.

THE COURT: Okay, next question.

Q. Would you - - Would you agree with the premise that rain would affect the levels of water in a creek or a river?

A. At times, at times it doesn't bother it at all.

Q. Do you recall ever having taking any of these photos that have been admitted into evidence following a rain event?

A. I think you objected to some of the pictures taken in October. Don't quote me on this but I think it was after we had that hurricane that just blew through, right around the time of our prior - -

THE COURT: Well, those photos are not in evidence. So, let's not talk about them.

Q. But in terms of these photographs were any of

these taken - - To your recollection were any of these taken following a rain event?

A. They very well may have been. I just don't know.

THE COURT: Would you like to see the photos?

A. I'm okay.

THE COURT: Okay. I can have the Clerk give them to you if you want them in front of you.

A. No, no, Your Honor.

THE COURT: Okay.

Q. Would you agree with the general premise that at certain times of the year rivers and creeks flow higher than they do at other times of year?

A. Yea, but the, uh - - These creeks in particular are very, very steady. I go out there all the time and when we have a rain event, I don't know how you're defining a rain event, but if we have a significant rain event, I mean a deluge, okay, you know, like today, I haven't been out, but, no, the creek levels may rise for a day, maybe two, become muddy, sort of murky, sort of gross but then these creeks in particular, in my opinion and my experience, they go right back to the baseline. And so, the pictures that I have shown to the Court and to you, they're very representative of how this creek looks almost all the time.

Q. Would you agree that in times of drought creek

levels would be lower than they would normally be?

A. Yea, but remember, this is a spring fed creek here and so that spring provides the water to I think all of Keedysville and half of Boonsboro and the water level in that, in the Spring Creek is generally the same. Um, in most areas, now, yes, during the summer does it get can it get very dry if we have extended periods of drought? Yea, of course, they can get a little lower. But in the twelve years that I've been there, like I said, those pictures are representative of the way the creeks look.

Q. Are you aware that the Little Antietam Creek originates in Pennsylvania?

A. No.

Q. Have you ever outside the boundaries of your property explored or made a determination as to the water conditions and other areas of the Little Antietam Creek?

MS. PRAWDE: I'm going to object to the relevance here.

THE COURT: What is the relevance outside of this property?

MS. PEEPLES: The relevance is that in terms of the type of waterway, while you may have under principles of navigable law. If you have certain parts that aren't navigable that doesn't necessarily render the entire

river unnavigable.

THE COURT: But I think that we had discussed previously that you can have navigable parts and you can have un-navigable parts which I think is what you're saying.

MS. PEEPLES: Right.

THE COURT: And that those parts can be treated under the law differently.

MS. PEEPLES: Correct.

THE COURT: Okay.

MS. PEEPLES: I just want to know if he knows about other parts of this creek that - -

THE COURT: I'll allow him to answer the question but I recognize my focus is within the boundaries of Mr. Estes' property. Have you explored the rest of the creek anywhere to see what it looks like?

A. Yea, the, I mean the creek runs for quite a long ways. There's an area that's I call it the old bank. It's where Town Hall is in the center of Keedysville. And there's a big waterfall there actually. It's probably, I don't know, five, six feet high. Certainly, wouldn't want to take a kayak over that I don't think. In the area beneath that is very, very shallow. I used to walk my dog there all the time. And I know the owners, I can't remember their names right now, they used

to let me walk up in there before I bought my house. And that's very, very shallow too. You can't swim there. You can't kayak. You can't do anything up in there. Um - -

THE COURT: Okay. Next question.

Q. You testified that you have that the waters are very shallow. Have you taken more than one measurement of the depths of the Antietam Creek along your walk?

A. Yeah. The other day when I was out there? Certainly, I've taken some measurements, you know, and I took measurements often times to benefit you and Mr. Holder's thinking, wow this is probably the deepest spot here. Let's take a look and see how deep it is. But, yeah, that water varies from literally, um, and inch deep. Um, to as you can see from the pictures I mean the land is entirely exposed almost across the entire body of the Little Antietam Creek as well as Spring Creek.

Q. Have you taken water depths at different times of the year?

A. Yeah. I mean if you want to call depths with a measuring stick probably not. Probably just done on one occasion but remind you I walked there every day. I wear my same black boots every day when I go out there, most days I'd say. Or my flipflops or, or something where I can get across the creek or walk through the field. And,

you know, if you want to take a visual measurement I can tell you that my boots on the inside never get wet unless I really want them to.

Q. Okay.

A. So, you're talking less than, less than a foot in generally in most areas, you know, in a lot of these areas you're talking six inches or less. And we're also talking about the breadth, right. You may have a little channel that is a foot wide which might be six, eight inches deep, maybe a foot. But then the rest of the breadth of the stream is entirely impassable and it's covered with rocks, debris, earth. So, yeah, I've measured it by just walking in it.

Q. Speaking of walking you mentioned that you first encountered Mrs. Holder when she was walking with Mr. Holder in the creek. Do you know how many times you personally seen Mrs. Holder in the creek?

A. Twice.

Q. Did she say anything to you at that time?

A. I can't remember. I think most of my conversation was with Mr. Holder. But I can't remember. I think I talked to her, to her briefly. I think she's related to a guy named Austin Flook. Don't quote me on that. And to the ex-mayor of Keedysville, Barry Levy and I'm not sure if that came up in that conversation or not.

Q. Did you find her to be cordial?

A. Her, at that time? Uh - -

THE COURT: On either of the two times that you saw her in the creek.

Q. Were they the two times that you saw her?

A. Yeah, yeah. She was, she was okay.

Q. I have no further questions.

END OF CROSS EXAMINATION BY MS. PEEPLES

THE COURT: Okay. Mr. Holder.

MR. HOLDER: Yes.

CROSS EXAMINATION

BY MR. HOLDER:

Q. Mr. Estes, you said you graduated from Harvard. What year was that?

A. 1993.

THE COURT: Hang on counsel. Or hang on Mr. Holder. To clear things up for the Clerk, the exhibit number 14, the ones that are admitted, those will be called 14a. The ones that were not admitted will be called 14b. is that okay Madam Clerk?

CLERK: Thank you.

THE COURT: Yes, ma'am. Alright, Mr. Holder, go ahead.

(Plaintiff's exhibits 14a and 14b were marked for

identification. Plaintiff exhibit 14a were admitted into evidence. Plaintiff's exhibits 14b were not admitted into evidence.)

Q. Um, you said you lived in Massachusetts until you graduated college is that - - How long did you live in Massachusetts?

A. From 5th grade through college.

Q. What year was that?

A. What year was what?

Q. That you moved from Massachusetts to Maryland.

A. Maryland. I moved to DC, I did a summer clerkship for Senator Kerry when I lived in DC but my dad moved out to Keedysville during my brother's senior year at Georgetown which would have made me a junior so 1991, '92 probably somewhere in there.

Q. In your prior testimony do you remember telling me you moved to Keedysville in 1998?

A. I didn't testify to that today.

MS. PRAWDE: I'm going to object to what testimony you are referring to.

THE COURT: Yes, you have to, you have to explain what - - If you're - -

Q. Do you remember a deposition we had in the

Jeffery Young case?

A. Yeah.

Q. On April 20, 2021?

A. Uh huh.

Q. Do you remember when you told me when you moved to Keedysville, the first time you were in Keedysville?

A. I don't remember. I remember talking about - - Mr. Holder had sent me a letter, Your Honor, um, pleading for me to settle this case saying that we were, we were old friends.

THE COURT: Hang on a second. Now we're talking about - - Hang on. We're talking about settlement discussions, settlement negotiation. That's not relevant for the issue that I'm handling.

A. Okay.

THE COURT: Let's make sure that we're clear here. Mr. Holder is asking in the deposition that you took, which he's described to you, do you recall telling him that you moved to Maryland in 1998?

A. I don't remember.

THE COURT: If you remember, you remember. If you don't remember, you don't.

A. I don't remember this specific conversation. I'd like to answer with some, laying some groundwork here.

THE COURT: I don't need the groundwork. I just need

to know do you remember the answer, "I moved to Maryland in 1998."

A. I remember telling Mr. Holder generally when, when I had moved to this area, yes.

THE COURT: Okay.

A. I did not, and for the record I did not move here when my father moved here in 1991 but I did spend some time at his residence on Red Hill. And I don't remember the exact dates.

THE COURT: Because you were still in college and then you went to law school.

A. Yes. It's a long time ago.

THE COURT: Next question, Mr. Holder.

Q. During that time, you moved here when was the first time you were in Keedysville?

A. I honestly can't remember. Um, my father - - Like is said, the first time I was in Keedysville my father lived, I'm not sure the relevance here, but my father lived on Red Hill. He rented a little apartment when I was in college. And my brother was in his senior year at Georgetown. I came down visited him at Christmas time and Thanksgiving maybe. Um, probably several other times but, again, it's a long time ago. 19 - -

THE COURT: Next question.

Q. Okay. When was the first time you were on the

property that shown on that Plat 9186, the first time in your life you've ever been there?

A. Uh, probably - - I don't remember the first time. Used to walk my dog down in that bridge area.

Q. Could you - - What bridge area - -

THE COURT: Well, hang on a second. You bought the property on 9/1/86. The first purchase was in 2010, is that correct?

A. That's correct. I was there before then.

THE COURT: Did you go to that property ever before 2010 when you purchased it?

A. Yes, yes.

THE COURT: I think that's what Mr. Holder is asking.

A. Yes.

THE COURT: When is the first time you went to the property before 2010?

A. I honestly don't, don't remember.

THE COURT: Okay.

A. I honestly don't remember, I mean, probably ten years before that would be my guess.

THE COURT: Okay, Mr. Holder, next question.

Q. So, could it have been any earlier than ten years before 2010 that you first went there?

A. I don't know. I honestly don't remember the first time I went there, no.

Q. When you visited your dad did you go down there when you used to visit your dad?

A. No.

Q. And do you remember going down to that property after you moved here in 1998?

A. Yeah, I've been down in that area. Um, not the area in question here but, um, went up to the old washed out railroad bridge area. Sat up on the abutment. That was, geez, I don't know. I think I was probably still in law school, so.

Q. Would that have been with Billy Denny?

A. Yeah, I can't remember.

Q. Was that just one time you went there?

A. I think I went once, yeah, maybe twice. I just can't remember. That was so long ago.

Q. Okay. And when you went to the other property on 9186 was there any other way you would have gotten there possibly walking through the stream that is the Hopes?

THE COURT: What other property are you talking about?

Q. I'm sorry. The property on 9186 depicted.

THE COURT: The property that he now owns? Is that what you're talking about?

Q. Yes. The property you (unintelligible) as lot 2 it's the subject of this litigation.

THE COURT: I guess your question is how would he have gotten there.

Q. Yeah where did you go when you there prior to your ownership?

A. Down Antietam Drive if I remember correctly. There's like a yellow house there to the railroad tracks, they're no longer there. And then would have walked east along those railroad tracks. I believe that's right.

Q. And then down to where those stones you were talking about?

A. I didn't go down the river.

Q. Okay, so when you say you visited the property before you just walked to the railroad bridge and looked at it. Is that accurate?

A. Yeah, I was in that area. That's where I was. So, the actual physically setting foot on that property in that area, no. I didn't go down there. I saw other people go down there but I didn't go down there, no. No, that's the railroad property, right, so.

Q. So, when you said in your affidavit accompany to the MSJ, which you have no personal, you have personal knowledge and no one else that the Hopes used the property known as Lot 2, what personal knowledge did you have between 1993 and 1998 of that property?

MS. PRAWDE: I'm going to object.

THE COURT: What is the relevance in this?

MR. HOLDER: As candor in the Affidavit in this case. I mean he says he has personal knowledge to property. He sort of just says whatever he wants.

THE COURT: Well, you got to, you got to lay a foundation.

MR. HOLDER: Okay.

THE COURT: Okay, I don't know what affidavit you are talking about.

Q. Mr. Estes, did you file an Affidavit in Opposition to a Motion for Summary Judgment in April of 2021?

A. You have to show it to me.

THE COURT: Do you have it?

A. There's been so many filings in this case.

THE COURT: That's what I am suggesting to you Mr. Holder. If you want to impeach somebody with what they wrote it's best to put what they wrote in front of them. Defendant's number 8? It was number 8 in the exhibit too?

MR. HOLDER: It was number 8 on the (inaudible) as well.

THE COURT: We will call it 8-8.

(Defendant Holder's exhibit 8 was marked for

identification.)

A. Is there a particular area that you want me to - -?

Q. Near the area where you - - Mind if I approach to show you?

A. No.

THE COURT: Hang on a second. Have you looked at Exhibit number 8?

A. Yeah.

THE COURT: Do you recognize it?

A. Yeah, looks like - -

THE COURT: Is that your signature on the last page?

A. That is my signature, Your Honor.

THE COURT: Flip it over and read to me what the title of the document is?

A. Affidavit.

THE COURT: Okay. Is it your Affidavit?

A. Yes.

THE COURT: Okay. Why don't you point him exactly to where you want him to look Mr. Holder? Just tell him what paragraph number you want him to review.

Q. Let's look at number 16.

THE COURT: Mr. Estes, why don't you read number 16 to yourself and I'm going to ask you to read it to me aloud.

A. "From 1993 through 2010 the Hopes continuously maintained open notorious exclusive and actual possession of the disputed property and were the only persons to occupy, maintain or otherwise make use of the disputed property during that timeframe."

Q. So, from 1993 to 1998 what personal knowledge did you ever use (inaudible) property in those lots - -

MR. PRAWDE: Objection.

A. I think you're getting caught - -

THE COURT: What's the objection?

MS. PRAWDE: Objection to the relevancy here. I think it's talking about the land. That's what that Affidavit was specifically about. It's not about the use of the waterway at all. It's not what this trial is about.

THE COURT: What's your response?

MR. HOLDER: It's about his candor to the Court and his testimony. It's an impeachment document.

THE COURT: I think what he's trying to do is impeach the witness based on giving potentially false statement within an Affidavit. Is that what you're trying to do?

MR. HOLDER: That's correct.

THE COURT: Okay, go ahead. Overruled.

A. Can you repeat the question sir?

Q. What personal knowledge do you have from 1993 to

1998 of the use of the property shown on that plat 9186?

A. I think you're getting caught up on personal knowledge, legal definitions of personal knowledge. The intent of this, the intent of what's written here is to state that, to my knowledge, that the Hopes were the only individuals, to my knowledge, that had an open, notorious whatever else it says in there. I think you're getting caught up that I purposely lied or, or said something that isn't accurate. Do I have personal knowledge from 1993 or whatever it is? No, if you're talking about personal knowledge that I was there for every day for twenty years and didn't see anyone go there. No. Or whatever you're trying to say. All this is, is it's an Affidavit indicating that one of the parts of this litigation is or was adverse possession. And it's my contention or the contention my attorney I believe - - I'm not going to go there. But the, the argument was that, look, we own this land. It's very clear from all the deeds that we own it. But in the alternative if the Court were to say, oh, you don't own it, then this is an argument for adverse possession. That's all it is. And, so, I don't know what you're trying to say but with all due respect to the Court, I worked in front of this Court for years as a practicing attorney. I tell the truth to this Court. Now, can we get caught up in some semantics

about what personal knowledge means? Sure, go ahead. It's fine. But I have never intentionally lied to this Court. Would never intentionally lie to this Court. And honor this Court and what it stands for. So, if you want to go ahead and try to impeach me about what personal knowledge really means, have at it, sir.

THE COURT: Alright.

Q. Can you read this statement you signed under oath on the back of the affidavit?

A. Sure.

MS. PRAWDE: I'm going to object.

THE COURT: Overruled. He can read it to me.

A. "I solemnly affirm under penalties of perjury and upon personal knowledge that the contents of this documents are true."

Q. Okay, so, would it be fair to say that every Affidavit that you filed into this case is upon information and belief and not personal knowledge? Did you have it - - Did you have it, maybe a misunderstanding of what personal knowledge is?

MS. PRAWDE: Objection.

THE COURT: Sustained.

Q. Do you understand what personal knowledge is?

MS. PRAWDE: Objection.

THE COURT: Sustained.

Q. As a lawyer, do you understand the legal definition?

MS. PRAWDE: Objection.

THE COURT: Mr. Holder.

MR. HOLDER: Uh huh.

THE COURT: I understand your point.

MR. HOLDER: Okay.

Q. Do you remember signing an Affidavit on May 12 of 2021?

THE COURT: Do you wish to have Defense exhibit number 8 admitted into evidence?

MR. HOLDER: Could I have Defendant's exhibit - -

THE COURT: I'm sorry. Defendant's exhibit 8.

MR. HOLDER: Defendant's exhibit 8 admitted into evidence?

THE COURT: Any objection?

MS. PRAWDE: No objection.

THE COURT: Okay. It will be admitted.

(Defendant Holder's exhibit number 8 was admitted into evidence.)

A. Do you need this sir?

THE COURT: Yes. Thank you.

A. You're welcome.

MR. HOLDER: Could you hand him Exhibit number 8?

THE COURT: I'm sorry?

MR. HOLDER: Could you please hand him Plaintiff's exhibit number 8 back again?

THE COURT: Defendant's.

MR. HOLDER: Yes, Defendant's.

Q. Is that one signed May 12, 2021?

A. Yes.

Q. Okay, do you see paragraph 21?

A. This?

Q. Yes.

A. Yes.

Q. Um, could you read - - Could you read that to refresh yourself and the Court with that statement?

THE COURT: Just read it to yourself, Mr. Estes.

A. Okay.

THE COURT: Are you going to have a question about paragraph 21?

MR. HOLDER: I did.

THE COURT: Do you want him to read it aloud?

MR. HOLDER: If you would please.

A. "While I requested that Mr. Holder provide me with some proof that he has a valid claim to part of my property, Mr. Holder thus far has not presented any evidence to refute Mr. Frederick's opinion or to raise a dispute to the fact that Mr. Frederick's plats followed

the courses and distances contained in the Holder in Estes' change of title."

THE COURT: Okay. Do you have a question about paragraph 21?

Q. Yes. Did I give you a letter from Mr. Fredericks (sic) date of February 13 and February 14 in District Court?

MS. PRAWDE: Your Honor, I don't - - Sorry, I don't want to interject but I just want to make sure I'm clear. Is it exhibit 8 Estes Affidavit dated 6/21/22?

THE COURT: Yeah.

A. 5/12/21.

MS. PRAWDE: Oh, 5/12/21. Okay. Alright, thank you.

A. Sir?

THE COURT: The question is did he provide you a letter, what from Fred Frederick?

Q. From Fred Fredericks (sic).

THE COURT: In the District Court house?

A. Yeah.

Q. Okay. And is it your, it was your opinion in this document that that wasn't some proof that there was a dispute of the fact that Mr. Frederick's plat followed the courses and distances contained in the Holder, Ben Estes chains of title.

MS. PRAWDE: Objection. Relevancy.

THE COURT: I'm going to sustain that objection. I understand what you're saying, however.

MR. HOLDER: Okay.

THE COURT: Certainly, it could be up to Mr. Estes to say I don't think that's proof of anything and therefore his Affidavit is not a lie. You understand what I mean?

MR. HOLDER: I do.

THE COURT: Okay.

MR. HOLDER: It was used to defeat a motion. But I understand.

Q. Um, Mr. Estes, are you aware that this Court in September 20th Order decided the boundary of the property was that on Plat 10955?

A. Yes, I mean I think that was part of it. I haven't memorized the Order but that was the general gist of it.

Q. And are you aware - - Oh, I'm sorry.

THE COURT: He said that was the general gist of it.

Q. Okay. But that wasn't exactly what was ordered?

A. I don't remember the entire order.

MS. PRAWDE: Objection.

A. No, if you want to show it to me I'd be happy to spend - -

THE COURT: Overruled.

A. - - half an hour and read it.

THE COURT: Go ahead Mr. - - Go ahead Mr. Holder. Next question.

Q. Are you aware of a deed that was filed along with that plat, that the site of that plat in the deed by like a - -

A. I don't know what you're talking about.

Q. Like a consolidation deed that had a parcel reconfiguration with it.

A. I don't know what you're talking about. You'd have to show me and provide it to me because I'm not - -

THE COURT: Why are we - - Why are we talking about the confirmatory deeds - -

MR. HOLDER: Well - -

THE COURT: - - with this witness?

MR. HOLDER: It's very important because he said that there's no part of Uncle Eddie's property that touches the creek.

THE COURT: That's his belief looking at 9186.

MR. HOLDER: Okay.

THE COURT: But he then later said that he thinks there might be an area on 10955 that goes into the creek does it? I heard him say that?

A. That's correct.

THE COURT: Mr. Holder? Mr. Holder? It went by really quick and nobody else heard it except me.

MR. HOLDER: I got a terrible headache. I'm sorry I missed it.

MS. PEEPLES: Heard it.

THE COURT: It's okay. I want you to relax. I did hear him indicate that on - - You heard it too?

MS. PEEPLES: I heard it, Your Honor.

THE COURT: Okay. He acknowledged that on 10955 there might be a small area where it does the Uncle Eddie property actually goes into the creek on 10955.

Q. Did Mr. Frederick at your request has staked that area where it goes into the creek?

A. Yes. Um, he was not platting 10955 I don't believe.

Q. I'm sorry, so when you asked Mr. Frederick to survey the property he surveyed plat 9186?

A. I asked him to place property markers on my, where my property line is. That's what I asked him to.

Q. As of plat 9186?

A. I asked him to plot where my property line is.

Q. Okay.

A. You'd have to ask - -

Q. I would have to ask Mr. Frederick?

A. I didn't say that.

Q. Who would I ask if it wasn't you to (unintelligible) agent? Was he your agent?

MS. PRAWDE: Objection.

THE COURT: Where are we going with this Mr. Holder? Are you about to show me a picture of the stake?

MR. HOLDER: I am.

THE COURT: Good, because I've seen it before. It's not - -

MR. HOLDER: I know. I have to ask Mr. Estes because if, if Mr. Frederick was asked to plat 59186 and I'll proffer to you Mr. Estes, that's how you testified.

A. Okay.

Q. Did you ask him to do that and then you testified there's no property on 9186 that's in the creek? And I show you this picture. Is this the picture of the stake?

(Defendant's exhibit 9 was marked for identification.)

MS. PRAWDE: Objection.

A. As it's shown on that - -

THE COURT: Overruled. Slow down guys. Okay. Slow down. Do you have that marked?

MR. HOLDER: I do.

THE COURT: Okay. Hand it to him. What's it marked Mr. Holder? Number 9?

MR. HOLDER: Defendant's exhibit 9.

THE COURT: Mr. Holder. Look at me, look at me. Mr. Estes, do you recognize what's photographed in

Defendant's exhibit number 9?

A. Yes, I do.

THE COURT: Do you agree with me that that is a stake in the Antietam Creek?

A. Yes, or, no, no I don't.

THE COURT: What - -

A. This is on dry land.

THE COURT: Okay. Okay. Do you know approximately where that stake is based on your prior testimony?

A. Um, if you were to look at 10955 there is a little piece of the Uncle Eddie's property that appears to jet out into the Little Antietam Creek.

THE COURT: Okay.

A. And it's probably halfway, a little more than halfway between the railroad bridge washed out and where the Spring Creek comes in.

THE COURT: Okay.

A. But this is not in the middle of the creek.

THE COURT: Do you believe - - Do you believe that that - - I understand. Do you believe that that stake is that point where it appears on 10955 that the Uncle Eddie's property goes to its what I would call its eastern most point?

A. Yeah. Yeah I would say.

THE COURT: Okay.

Q. Would it be fair to say that's at the end of the second line and should come south to north from the railroad bridge?

A. I don't know - - I don't know what you - - I don't know the lines.

THE COURT: You're probably talking about plat 10955 though Mr. Holder, right?

MR. HOLDER: Well, I believe that courses and distances so it be the northern end of L-5, if you're looking at plat 9186.

THE COURT: Do you want him to look at Plat 9186? You either have to give it to him or you have to let him down.

MR. HOLDER: (Inaudible).

THE COURT: Okay. Let's stop for a second.

MR. HOLDER: Sure.

THE COURT: Is there any objection to the admission of Defendant's exhibit number 9, which is a picture of a stake?

MS. PRAWDE: No objection.

MS. PEEPLES: No objection.

THE COURT: Okay. Number 9 will be admitted.

(Defendant's exhibit 9 was admitted into evidence.)

Q. Is the stake in exhibit number 9 placed, to your

knowledge of the survey, at the end of L-5, the northern end of L-5 on plat 9186?

A. That would be my guess, yes.

Q. Okay. Does he know for sure?

A. I didn't trace each one of these points with Mr. Frederick and say can you show me where L-5 is, can you show me where this point is. No, they placed a stake on land.

Q. Can you see water on both sides of that stake in the picture number 9?

A. I see the land on one side. There is some water there too.

THE COURT: Can you hold it up so I can see it?

A. Yeah.

THE COURT: Which direction is this facing? Do you know Mr. Estes?

A. This is facing north, I believe. Spring Creek, I think, comes in right here.

THE COURT: Okay.

A. If Mr. Holder - -

THE COURT: So, you believe, if I'm correct, on the other side of that creek is the main body of your land - -

A. Yes.

THE COURT: - - and at this point if I'm standing and

taking that photograph my back is towards the Uncle Eddie's property?

A. Yes.

THE COURT: Okay.

A. Uncle Eddie's property is generally up here.

THE COURT: Out to the left?

A. Yep. That's exactly right.

THE COURT: Understood.

A. Yep.

Q. Did you produce that to me in discovery?

A. I believe so, yeah.

Q. And looking at that picture is that kind of a mere image kind of looking the other way down towards the railroad bridge same stake?

A. Looks it, yes.

THE COURT: And that is Defendant's exhibit number 10?

MR. HOLDER: That is Defendant's exhibit number 10. Move to admit.

THE COURT: Would you like to admit it?

MR. HOLDER: I would like to admit it.

THE COURT: Any objection to number 10?

MS. PRAWDE: No objection.

MS. PEEPLES: No objection.

THE COURT: Number 10 will be admitted.

(Defendant Holder exhibit 10 was marked and admitted into evidence.)

THE COURT: Okay, so this is at, for my, for my edification only, I'm calling this the F, the L-5 spike and now I'm facing in exhibit number 10 I'm facing south towards the railroad. Is that right.

A. Yes, Your Honor.

THE COURT: Alright, Mr. Holder do you want these back for your examination?

MR. HOLDER: Yes, please.

THE COURT: Go ahead.

Q. (Inaudible) Mr. Estes. If you can hold number 9 as well.

A. Sure.

Q. And number 10 can you see water on both sides of the stake?

THE COURT: Can you hold it up to me?

A. Yeah. Um, to the right of the stake-out that looks like dry land to me. But, look, I'm not going to sit here and argue with you. If there's water in this picture, yes. But it's clearly not navigable water. The stake is not in the water. It's on land. Um, you can see the riffles in the creek right here. That's maybe an inch deep. And there's all this obstruction across the

side. So, sure. Could there possibly be if you look on both of these things, exhibit 9, Your Honor? Is there some water over here? Yeah, you're talking an inch deep water maybe. I don't know if that's there still. So, maybe it is, maybe it isn't. That's what is see.

Q. Okay. Does that area generally between what you called I think the big pool down at the southern end and then do we call it the spring branch pool? Is that what we called the other one?

A. Yeah, yeah.

THE COURT: We had called it - - We can call it that.

MR. HOLDER: Okay. I mean we got to call it something.

THE COURT: It looks to me on 9186 it's halfway between where he described big pool and where he described the spring creek pool. Does that sound about right Mr. Estes? That's my recollection.

A. Yeah. I mean it's near where L-5.

THE COURT: Okay. L-5 starts. Or no, L-5 ends if you go south to north.

A. Yeah.

Q. When you asked Mr. Frederick to stake property lines did he stake this area generally up in the northeast end? Did he stake along this fence line for you?

A. He put a - - Yeah, he put a, um, no, he located a pin, um, up in there. And he loc - - I think he located two or three pins up in there actually. Yes. So, he just located the pins.

Q. He didn't place any stakes?

A. Uh, oh, he did. He placed some wooden stakes too. I think. I mean I can't remember every single thing that he put there. I think he flagged some trees and - -

Q. Mr. Estes, I'm just - -

THE COURT: Mr. Holder. Mr. Holder. Mr. Holder.

MR. HOLDER: Yes.

THE COURT: I feel like we're getting kind of deep into the issue of where the line is and how it got to be where I found it to be, which I indicated is not an issue for this trial. This is not an opportunity to relitigate where the line is. This is an opportunity to discuss the Water Law of the State of Maryland, to look at pictures so that I can understand water levels and so that I can understand whether I should or should not grant an injunction. Why - - Where area you going with this line of questioning?

MR. HOLDER: With all due respect the difficulty is knowing the foundation of why I'm about to ask him what I'm going to ask him versus (unintelligible) outside of

the issues. So - -

THE COURT: What are you about to ask him?

MR. HOLDER: Well, he said I trespassed. He said - -

THE COURT: Trespass is not the issue for today.

MR. HOLDER: Well, he said I - - Well, the reason he wants me enjoined is because I came down his hill running and screaming.

THE COURT: I understand. That's one of his pieces of evidence. I think the broader issue for me to decide is is injunction an appropriate form of relief for any landowner when a neighbor comes onto their land? Whether you call it a trespass or not, I don't even need to use the word trespass. Trespass isn't the issue before me. Whether somebody trespassed and whether there were damages therefrom may be an issue for the jury. I'm not, I'm not too concerned about labeling trespass.

MR. HOLDER: Alright.

THE COURT: Okay. So, let's go back to what I asked. This issue, these issues you're talking about that where Fred Frederick put stakes. What is that driving us to?

Q. Well, let's say we have this water channel against Uncle Eddie's and there's stakes in the middle of the creek if you can kayak in the big pool and you can walk on Uncle Eddie's side down through the creek what's it matters if the kayak drags to the bottom when you get

to the spring pool. Why couldn't you just take the left side instead of the right side if you're worried about touching this area where you say it's too shallow?

A. Is that a question because you'd have to start all over again if I need to answer that question?

Q. Uncle Eddie's owns to the center of the creek in the middle of that Little Antietam Creek that connects the two big pools you said you could kayak in why can visitors, guests, licensees of Uncle Eddie's not kayak and walk right through the left side? What right do you have to exclude people when Uncle Eddie's property goes to the center of the creek?

MS. PRAWDE: Objection.

THE COURT: Sustained. That's, that's my decision.

MR. HOLDER: Okay.

THE COURT: You can make that in argument.

Q. Alright, is it possible for somebody to take a kayak down to the big pool, walk through the area of Uncle Eddie's that's in the creek and then go through the spring branch pool?

A. No. I'm not sure I understand the question. In Exhibit 10, Your Honor, you are looking directly up towards the big pool of Little Antietam Creek. The big pool or where I testified to, you might be able to float, is way out here near the, near the washed out railroad

bridge. From his own exhibit you can see that this is clearly not navigable waterway. There's obstructions, it's inches deep. It may be that Uncle Eddie's owns to would be to the right of this stake, okay. But that's where their property line ends. They would have to access my property underneath the creek here or on the east side of the bank or west side of the bank or the east side of the bank to get from the big pool here, past two inch deep water, tons of obstructions, all the way down here to reach this point. Or they could access it from Uncle Eddie's from the west to get to this point here but again they can't get upstream and they can't get downstream from here without touching my property. They can't get to the pool at the base of where the two creeks come together without going on my land. That's my - -

THE COURT: I think his answer was no to your question.

Q. Okay. Do you recognize that area as being the railroad bridge?

THE COURT: What exhibit are we on?

MR. HOLDER: That is exhibit 11.

(Defendant Holder's exhibit 11 was marked for identification.)

A. Yes.

Q. And you've never seen anybody kayak in the railroad bridge?

A. No.

Q. Would you describe that picture of somebody kayaking?

MS. PRAWDE: Objection. Was this produced in discovery?

MR. HOLDER: Yes, ma'am.

MS. PRAWDE: When was this produced?

MR. HOLDER: Let me look. March of 2021. (Unintelligible).

MS. PRAWDE: Okay.

A. I've never seen this picture before, Your Honor. Maybe it was produced maybe it wasn't. If there was a question there - -

THE COURT: Did you take that photo?

A. Did I take this photo? No.

MS. PRAWDE: Object.

Q. Do you know the area?

A. I know the area, yes.

Q. Okay, is it around the northern pool near the railroad bridge?

A. There are other washed out railroad bridges on the Little Antietam Creek but to my knowledge - - What it looks like is that general area, yes.

Q. You walk the property every day, you know what it looks like, correct?

A. Yes, yep. And that looks like that area up there, yep.

Q. What you call the big pool?

A. Yeah, the big pool.

MR. HOLDER: Move to admit Exhibit 11.

THE COURT: Let me see it. Any objection?

MS. PEEPLES: No objection.

MS. PRAWDE: I'm going to object. Mr. Estes doesn't know who took this photo, when it was taken, who was in the photo, anything about that.

THE COURT: Which way is this looking do you know?

MR. HOLDER: Standing out about here (unintelligible) - -

THE COURT: Hang on. I'm asking the witness. Do you know which way?

A. Um, can I take a look?

THE COURT: Yes.

A. This is looking up - - The washed out railroad bridge above it is here and that's the southern boundary of my property. So, whoever took this picture is standing in the middle of the creek or presumably on a kayak and apparently, I don't know, maybe three inches of water, taking a picture of this individual kayaking

upstream. And this is the big pool that I told you that you (inaudible).

MS. PRAWDE: I'm just going to admit or object that there's been no testimony or foundation about who took this photo, when it was taken, who was in it, anything in that regard, what time of year.

THE COURT: Understand.

MS. PRAWDE: Said something that Mr. Estes can't testify to.

THE COURT: Down here near the bridge abutment is that, is that the rocks and things that I've seen in other photos?

A. Yeah, yes, that's correct. Yes.

THE COURT: Okay. The objection is sustained for now. It lacks foundation as to who took the photo, what time, when it was taken. You may have additional information to provide me during your testimony as to where you got that photo. Okay.

MR. HOLDER: Yes, Your Honor, thank you.

THE COURT: Alright.

Q. I'm going to show you Defense exhibit 12. Is that photo generally the same area of what you would call the big pool?

(Defense Justin Holder's exhibit 12 was marked for

identification.)

A. Yes.

Q. Looking south and north?

A. Yes.

Q. Did you take that photo?

A. I honestly can't remember if I took this photo or not. I may have.

THE COURT: Looking north?

A. Looking north, yes, Your Honor.

THE COURT: Okay.

Q. Do you know what time of year that is?

A. Looks like Fall, Winter. Don't know.

Q. Do you know where you were standing when you took it?

A. I don't know that I took it but I know whoever did take it very clearly shows obstructions in the water very shallow water at the base of the big pool as I've testified to and even further down.

THE COURT: Did you get this - - Where did you get this photo Mr. Holder.

MR. HOLDER: This was his discovery production.

THE COURT: His discovery production?

MR. HOLDER: Yes, Your Honor.

A. Okay.

THE COURT: Alright.

Q. Can you read the number bate stamped that's on the left side there? Right about the center of the left side of the photo. It's in black.

A. Maybe you can point it out to - - Oh, there. Estes 7.

THE COURT: That's okay. It's exhibit 12. Estes what?

A. 748.

THE COURT: Hand it back to Mr. Holder. Do you wish to have this admitted Mr. Holder?

MR. HOLDER: Yes.

THE COURT: Any objection to Exhibit 12?

MS. PRAWDE: No objection.

THE COURT: It will be admitted.

(Defendant Holder's exhibit 12 was admitted into evidence.)

Q. Generally, is there a fence along this southern end of plat 9186 starting here at this corner fence post found in the very southeast corner following the abandoned B&O Railroad? Is there generally a fence along this conservation easement on the south end?

A. Yes.

THE COURT: Looking to Exhibit number 1, which is Plat 91866, 9186, and we're looking at the Forest

Conservation area that is to the furthest south Mr. Holder?

MR. HOLDER: Yes, Your Honor.

THE COURT: And which area are you asking about a fence?

MR. HOLDER: A fence at the southern end of this Forest Conservation area. Right here there's a corner fence post along this line along with the (unintelligible) in the railroad.

THE COURT: Is there a fence there?

A. Yeah. Yes.

THE COURT: Okay.

Q. Have you ever been over in this area where it says IP found on the west bank of the creek?

A. I can't.

Q. Right here in the very southwest corner of Plat 9186 by the - -

A. Yeah, I've been in that area.

Q. If you were to look from this IP post found with your camera and take a picture if you were going straight to this corner fence post found were those rocks that you talked about by the railroad bridge would they be on your right side or your left side? So, we're looking this way straight down this line and I'm pointing directly from the west to the east on this southern property line if we

took a picture, and I showed it to you, would the rocks be on your right or would the rocks be on your left?

A. They would probably be on both sides. Um, I, the exact location of that IP line where the IP found I think it's call there but, no, that is, right - - to my knowledge I think it would be right in the middle of that boulder field, in that general area, yea there's a - -

Q. Do you know approximately how wide, when I'm saying wide, I mean cross section of the creek, not from bank to bank, but from southern part of the creek to the northern part of the creek. Approximately how wide is that boulder section?

A. I don't know, 50 to probably 50 feet, give or take. I don't, I don't know. I know it's there but I'd say probably fifty feet, give or take.

Q. Are you aware - - Are you aware that Mr. Frederick redefined that right of way line due to a more accurate survey later that actually moved it more?

MS. PRAWDE: Objection.

THE COURT: Sustained.

Q. Is it possible if you use the property lines on 10955 with that boulder field isn't on your property it's on the property that you abandoned I believe that was the words in the stipulation to the Department of Natural Resources?

MS. PRAWDE: Objection.

Q. Is it possible?

THE COURT: Overrule it but only if you know.

A. I don't - - I don't know. My understanding is that that boulder field is on my property, yeah.

Q. What are you basing your understanding on, sir?

A. From I think you follow that fence line and you go across the creek. It's based upon where the bridge abutments are, how far down the stream and I think you had Fred Frederick place a, an iron pin there but when the, I had, when I had my surveyor - - Fred Frederick came out and plotted my location. It was in the middle of that boulder field. Actually, I think I marked it with a, with a green stripe but I can't remember. A green stripe or a gray stripe, so, that's how I, know.

THE COURT: We are approaching 5:00 o'clock. We've gone over. Okay. So, we need to end for day 1.

MR. HOLDER: Okay.

THE COURT: I will see you all at 9:30 tomorrow morning. And we will continue with Mr. Estes on the stand. Is that correct, Mr. Holder? Do you have more questions?

MR. HOLDER: Oh, I have fairly large - - I mean I'm just through the first top of my first page here. Just - - It's very difficult getting a straight answer out of

him it seems like.

THE COURT: I think we are doing fine.

MR. HOLDER: Okay.

THE COURT: Okay. So, I'll see you all at 9:30 tomorrow morning.

MS. PEEPLES: Your Honor - -

THE COURT: Hang on a second. We're finishing this in two days. We're not, we're not going to day 3, 4, 5. So, you need to decide how long you're going to question him if you want to get other witnesses on. Do you understand?

MR. HOLDER: With all due respect if this Court is going to order me I can't put on evidence that's fine.

THE COURT: No. I'm not going to order that you - -

MR. HOLDER: I'm not acquiescing.

THE COURT: No, no, no, sir. I'm not going to order that you can't put on evidence. That is not what I'm ordering. I am saying that we do have a limited amount of time. We've gone until 5:00 o'clock today. I went longer than normal. If you're telling me you've only scratched the surface of Mr. Holder's (sic) cross-examination, that's fine. Handle your case how you want to handle your case.

MR. HOLDER: Okay.

THE COURT: But this case is ending tomorrow

afternoon this portion regarding water law and injunction is ending tomorrow afternoon. So, you need to strategize how long you want him to be on the witness stand so that you can assure yourself time to get to other witnesses you wish to call. Do you understand what I'm saying?

MR. HOLDER: I understand.

THE COURT: Okay.

MR. HOLDER: Respectfully if the Court is ordering that I will convey any order that the Court gives me. But I will close my defense at the time my evidence is entered into the Court that I've been able to provide.

THE COURT: No, I'm not ordering anything Mr. Holder - -

MR. HOLDER: And I will do my best.

THE COURT: - - because what you're going to do. No, sir. What you're going to do is you're going to then appeal. You're going to go down to Annapolis and you're going to say that I've ordered you to do something. What I'm saying is that this matter is scheduled for two days. We have just used day number 1.

MR. HOLDER: Okay.

THE COURT: We've only gotten through one witness. I realize that we had a bit of a delay this morning but we're not even through one witness and you're telling me you have tons more information to get out of Mr. Estes

and I'm cautioning you, you need to strategize - - This is what attorneys do. The night between two days they strategize, what do I really got to get through him and how important is it to me to get to my witnesses.

MR. HOLDER: I will do my best.

THE COURT: Are you - - You need - - I'm giving you the opportunity and the understanding of how an attorney would do it tonight. They would be thinking strategically what, how much do they need to do with him as a cross-examination witness and how much do they need to do with their own witnesses because you subpoenaed a number of people.

MR. HOLDER: I have quite a bit of evidence to bring to this specific injunction and I've asked the Plaintiff for stipulations. I told her, with all due respect, I sent her an email a week ago and said I have two weeks' worth of evidence to put on. Can we stipulate.

THE COURT: No, no, no. Your stipulations if I read them correctly you were asking people to stipulate to things concerning Mr. Frederick's work, where the line really was, where the line ought to be and I don't know how you can expect people to stipulate to that when I already made that decision. That's the problem with the requested stipulation as I've seen it in the pleadings.

MR. HOLDER: Well, there's other stipulations you

haven't seen.

THE COURT: Okay.

MR. HOLDER: And, with all due respect, Mr. Estes at one point said you can't even get to the creek from the west bank and now we have a stake in the middle of the creek that you can walk right out in the middle of creek and I - -

THE COURT: Let me. I've looked at it. It doesn't look like it's in the middle to me. Looks like it is on land as he says and the water is right there.

MR. HOLDER: So how - -

THE COURT: The middle of the creek is a little - - That suggests that there's water all around that stake and I don't see water all around that stake. I'm just giving you; I'm trying to assist you so that you understand there is a time limit that cases can go. Okay.

MR. HOLDER: Your Honor - -

THE COURT: Usually, usually in injunctions is a half a day, Mr. Holder. I got two days because I knew you wanted it and I knew I wanted to give you the full opportunity. But we're already halfway through the first day and you're telling me you've only scratched the surface of Mr. Estes and I know you have other witnesses. I want you to be able to get to them, okay. That's what

I'm saying to you.

MR. HOLDER: Alright.

THE COURT: Ms. Peeples, anything?

MS. PEEPLES: Your Honor, procedurally, again, I explained to the Court this morning that I was here particularly concerning the water rights in as much as they may ultimately deal with the trespass later on. I'm not planning on putting on any witnesses. I plan on maybe tomorrow submitting a brief to the Court.

THE COURT: Okay. That be fine.

MS. PEEPLES: I mean before even making a motion at the conclusion of the Plaintiff's case do I need to be here while Mr. - - I mean I'm not, he's separate from me and I just - -

THE COURT: As is Uncle Eddie's.

MS. PEEPLES: As is Uncle Eddie's.

THE COURT: Uncle Eddie's isn't here.

MS. PEEPLES: Correct. I mean I would like to preserve an argument on the record at the close of evidence but at the same time because I think it's germane to a future trespass claim that could be coming down the pike against my client.

THE COURT: Well, then how do I, how do I allow you to argue on the record if you're not here.

MS. PEEPLES: I don't want to disrespect the Court by

just up and leaving during a proceeding or after I make a motion or something like that?

THE COURT: Do you have other obligations tomorrow?

MS. PEEPLES: I don't believe so.

THE COURT: Okay. Were you planning on being here at 9:30?

MS. PEEPLES: I was.

THE COURT: Okay, why don't we play it by ear and see how things are going and if there comes a moment that you think that your role here is finished, you and I can talk about that.

MS. PEEPLES: I appreciate that, Your Honor. I'm just trying - -

THE COURT: Rather than just standing up and walking away. That would be concerning.

MS. PEEPLES: I do not want to disrespect the Court.

THE COURT: No, no, I understand. Understand. Okay. Okay. I will see you all tomorrow at 9:30 a.m.

END OF PROCEEDINGS OF DAY 1 AT 4:58 P.M.

Digitally signed by Linde M. Cessna

DIGITALLY SIGNED CERTIFICATE

I HEREBY CERTIFY that I reported verbatim by electronic device the proceedings in the matter of, *Benjamin Estes v. Justin Holder, et al.*, Case No. C-21-CV-20-430, Volume I – Day 1, in the Circuit Court for Washington County, on December 15, 2022, before the Honorable Andrew F. Wilkinson, Judge.

I further certify that the proceedings were transcribed by me to the best of my ability in a complete and accurate manner, and page numbers 1 through 257 constitute the official transcript of the proceedings.

In witness whereof, I have affixed my signature this 3rd day of February, 2023.

Linde M. Cessna

Linde M. Cessna

Court Reporter